UNIVERSITY OF KHARTOUM

THE EQUALITY OF RIGHTS BETWEEN SHAREHOLDERS

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Contents

Dedication

To ... My father, the great man....!

May his soul rest in peace

To ... My mother, and my lovely wife...

To … My brothers, sisters and children.

Abbreviations

(SCA) : Sudanese Companies Act.

(ECA) : English Companies Act.

(a.g.m) : Annual general meeting.

(e.g.m) : Extra ordinary general meeting.

(o.r) : Ordinary resolution.

(e.o.r) : Extra ordinary resolution.

(s.r) : Special resolution.

(Co.) : Company.

S. : Section.

SS. : Sections.

S.G : Sudan Government.

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Preface

It is a common concept that company meetings and voting on them resemble the Parliament activities. This resemblance is well recognized in the legal curriculums and the voluminous company literature. The logical consequences for such resemblance is that an equality in members rights must be granted to all members of the company, also majority powers must be absolute and without limits. Such resemblance may be adequate in the old forms of companies, but it may be not precise in the modern company forms since that the modern company is authorized by law to issue the preference shares. As their name implies preference shares confer on holders' preference over the ordinary shares in respect of many rights in the company.

The equality between the shareholders in a company is well known presumption in the English Companies Law references. Professor Gower mentioned this presumption in his great Company Law reference "The Principles of Modern Company Law" This presumption remains exist unless there is a provision to the contrary in the memorandum or articles of association of the company. Whenever there is a provision to the contrary, the presumption of the equality between the shareholders will defeat then the preferentiality between the shareholders takes place. The question which may arise is whether the preferentiality may extents to reach a discrimination limit. Many of the Company Law writers explained this question and concluded that preferentiality will not reach a discrimination limit. They justified the issuing of preference shares by that it is for the benefit of the company as a whole since that the issuing of preference shares is one of the important means to capitalize and recapitalize the company. We add that many of the shareholders' rights are not effected by such issuing since these rights, by their nature, are not preferable and all holders of these rights must be treated equally, the examples for these rights is the right of a shareholder to prevent the ultra vires act, or the right of a shareholder not to have his obligations to the company increased without his consent.

Another feature of resemblance between the company and the Parliament is the majority powers in both. Again, this feature seems not precise in that majority powers in the company are not absolute powers and there are many limits imposed by the law on the company. These limits clearly appear in the relief of minority shareholders in many events, for example in winding up the company on the just and equitable ground, the intervention of the

court in the event of unfair prejudicial conduct of the company and in the personal and derivative actions.

This dissertation discusses the features and justifications of the preferentiality between the shareholders in one company when it is allowed by the company memorandum and articles of association. Also this dissertation explains rights on which such preferentiality is applicable and rights on which preferentiality inapplicable. Lastly, this dissertation explains the methods of the relief of the minority shareholders and the balance of powers between minority and majority shareholders.

Table of cases

English cases:

Sudanese cases:

Abstract

Sudan is a wide vast country, rich in many kinds of natural resources. It has been nick named "world food basket". Many mineral and oil discoveries were successful. In order to exploit these resources, economical instruments must be set to contain and utilize these diverse resources. Companies come at first to exploit resources for they are the most suitable tool to condense enormous capital and human resources under one management.

The law has intervened to arrange the affairs of the company as a legal entity. The innovation of the notion of the legal entity considered as one of the greatest discoveries during mankind heritage.

To encourage people in country like Sudan to form companies, it is necessary to spread company culture and to highlight its economic benefits for both state and individual, thus the researcher was keen in the first chapter of this dissertation to point out the legal and etymological definition of the company in the Sudanese Act and the English Act (from which the Sudanese Act was derived). To make use from the experience of other countries the researcher was keen to cast light on the American Law in this respect because U.S. A is considered as an outstanding example in this field. Equally well the researcher was keen to manifest the development for companies to show that company did not emerge by accident, but it was resulted from a long patient experience. This chapter compared between the company and other types of frame works like partnership and then concludes that the company is advantageous over partnership for many considerations detailed in this chapter. It was necessary to show the concept of the company as a separate legal entity. Also in this chapter the researcher has manifested different roles of the company in our life legally, economically and socially. Despite the fact that the share has its own legal nature in the law, the researcher has shown in this chapter its economical nature so as to show that the two natures of the share are co – related. By virtue of the membership of a company, a shareholder is entitled to the rights in such company, so, this chapter includes; definition of membership, the way to become a member and persons who can be members.

The second chapter which constitutes the main body of this dissertation is based on the fact that the common concept that the capital of the company is divided into equal shares qualifying holders to equal rights. It is obvious that the law in both Sudan

and England has authorized the company to prefer some types of over the ordinary shares, thus it was necessary in this chapter to justify this preferentiality. The researcher has explained the legal nature of the share. Moreover, the researcher has presented the different types of shares and explained the difference in their nature whether preference or ordinary. The researcher has detailed that all types of company shares are subject to the same obligations whilst preferentiality between different types of shares lies only in the rights of the shareholder in the company. Shareholder rights are much more than the three famous rights (the right to attend company meetings and vote, the right to dividends and the right to return of capital after winding up the company). After vestigial research in the English and Common Law the researcher conclude in this chapter that shareholder's rights are more than 20 rights. For the purposes of this dissertation, the researcher found that preferentiality is applicable by the nature of some of these rights, so, it can be classified as conditioned equal rights. By the nature of the remaining group, preferentiality is inapplicable, so, they can be classified as inherent equal rights.

In chapter (3), and under the light of the title of this dissertation, the researcher shifted to throw light to the need for making a balance between the two groups of the company (majority and minority). So long as it is not practical to equate between the two groups; then, there must be some sort of rational balance in exercising of different powers in the company. Chapter (3) also appears that most of the memorandum and articles of companies in the recent years confer to the board of directors, who are in fact the representatives of the majority, almost absolute powers. So some relief for the sake of the minority have been created, such like the intervention of the court whenever unfair prejudicial conduct against the majority is practiced. Another relief for the sake of the minority is the intervention of the court to wind up the company on the just and equitable ground. These two mentioned types of relief's are statutory relief. Other types of relief's are provided by the Common Law by the way of the derivative action and the personal action. Other statutory relief is practiced by the Department of Trade and Industry in England (in Sudan shareholders benefit from the umbrella of protection spread by the Companies Registrar Office).

الخلاصة

السودان بلد شاسع وغني بمختلف أنواع الثروات حتي أنه قد أطلق عليه (سـلة غـذاء العالم) ، وقد تم بنجاح الكشف بباطنه عن كثير من الثروات المعدنية والبترولية .لإستغلال هذه الثروات الإستغلال الأمثل فمن المهم إيجاد الأدوات التي بواستطها تستغل تلك الثروات المتعددة الأشكال. تبرز الشركات في صدارة وسائل إستقلال تلك الثروات ذلك أ ا الوعـاء الأمثـل لتجميع رؤس أموال ضخمة و كوادر بشرية مؤهلة تحت إدارة واحدة .

تدخل القانون ونظّم أمور الشركة وإنتهى الأمر الى إبتداع شخصية إعتبارية للـشركة ، ومعلوم أن إبتداع الشخصية الإعتبارية يعتبر من أهم الإكتشافات خلال التاريخ الإنسانى .

لتحفيز الناس فى بلد كالسودان لتكوين الشركات يبدو أنه من الواجـب نـشر ثقافـة الشركات وذلك يتم بإظهار فوائدها الإقتصادية للدول والأفراد على حد سواء . لذا نجـد أن "الباحث" قد حرص فى الباب الأول من هذه الأطروحة على إبراز المعنى اللغـوى والقـانونى للشركة فى القانونينن السودانى والإنجليزى، وللإستفادة من تجارب الدول الأخرى فقد كـان " الباحث" حريصا على إلقاء الضوء على قانون الولايات المتحده فيما يتعلق بهذه المعنى ، ذلك أن الولايات المتحده تعتبر من الأمثلة الباهرة فى حقل الشركات. كذلك أبرز البـاب الأول فى تلك الأطروحة التطور التاريخى للشركات لإظهار أ ا لم توجد مصادفة وإنما جاءت كنتـاج لتجارب طويلة. كذلك فقد قارن الفصل الأول بين الشركات وصورة أخرى من صور العمل الجماعى تتمثل فى "الشراكات" وخلص إلي أن الشركات لها الأفضلية على الشراكات لأسباب تم عرضها داخل هذا الباب . كذلك كان من المهم فى هذا الباب تحقيـق وتوضـيح معـنى الشخصية الإعتبارية للشركة وعرض مزاياها وأهم سما ا . بالرغم مـن أن لـسهم الـشركة مفهمومه القانونى الخاص به ، كان من المهم إظهار المفهوم الإقتصادى للسهم وذلك لإيضاح أن المفهومان القانونى والإقتصادى للسهم يقترنان ببعضهما البعض. عضوية الشركة هى منـاط الحقوق داخل الشركة ، لهذا فإن الباب الأول يوضح طرق العضوية والأشخاص الذين يمكـن لهم أن يكونوا أعضاء بالشركة.

الباب الثانى والذى يمثل لب هذه الأطروحة يتخلص فى أنه بالرغم من أن المفهوم السائد بأن رأس مال الشركة إنما ينقسم الى أسهم متساوية تخول كذلك حقوقا متساوية فإن قـانون الشركات الإنجليزى وقانون الشركات السودانى يمكنان الشركات فى كلا البلدين من إصـدار مايعرف بالأسهم ذات الأفضلية، لذا كان من اللازم إيجاد المبررات الإقتصادية والمـسوغات

القانونية للتفضيل بين حملة الأسهم. لذلك فقد أوضح هذا الباب الطبيعـة القانونيـة لأسـهم الشركة عموما ، وإستعرض أنواع تلك الأسهم وتحقق من طبيعتها وخاـص إلى أن أسـهم الشركات يمكن المفاضله بينها فيما يتعلق بالحقوق إلا أن الإلتزامات في الشركة ذات المـسؤلية المحدودة تكون دائما متساوية . أوضح هذا الباب كذلك أن الحقوق المكفولة للمساهم داخل الشركة إنما تفوق بكثير الحقوق المتعارف عليها بين العامة والتى تنحصر فى حق المـساهم فى حضور إجتماعات الشركة والتصويت فيها، وحقه فى حصص الأرباح ، وحقـه فى إسـترداد رأس ماله إذا ما صفّيت الشركة. بعد بحث وتقصى عبر القانون العـام وقـانون الـشركات الإنجليزى فقد إتضح أن حقوق المساهم فى الشركة تفوق العشرين حقاً. بعض هذه الحقـوق بطبيعته يقبل المفاضلة فيه بين المساهمين إذا لم يوجد فى عقد تأسيس أو لائحة الشركة مـايمنع ذلك، لذا فقد أمكن تسمية هذا النوع من الحقـوق بـالحقوق ذات الأفـضلية المـشروطة (conditioned equal rights) . كذلك فإن بعض الحقوق لاتقبل بطبيعتها المفاضـلة بين المساهمين ولذا فقد تمت تسميتها بالأسهم المتساوية بطبيعتها (inherent equal rights).

الباب الثالث من هذا البحث وعلى ضوء عنوان هذه الأطروحة ينتقل الباحث الى إبراز الحوجة لإيجاد نوع من التوازون فى التعامل مع الكتل داخل الشركة الواحدة (أغلبية وأقليـة) طالما أنه ليس من الممكن عمليا إيجاد المساواة بين تلك الكتل . هذا الباب يوضـح أيـضا أن الغالب من عقود تأسيس ولوائح الشركات المعاصرة إنما يكفل لس إدارة الشركات (الـذين يمثلون أغلبية المساهمين) سلطات مطلقة ، لذلك كان لابد من التدخل تشريعيا وإبتداع طـرق لإنصاف الأقلّيات فى الشركات كالسلطه التى يكفلها القانون الإنجليزى للمحاكم بالتدخل فى عمل الشركات فى حالة السلوك غير العادل أو المتحيز الذى تسلكه الشركه ، وقد يصل الأمر بالمحكمه إلى أن تقوم بتصفية الشركة نفسها بناءاً على مايعرف بقاعدة العداله والإنـصاف إذا ماتطلب الأمر ذلك. كذلك تدخل القـانون العـام (the Common Law) وأتـاح للأقلّيات مايسمى (derivative action) ومايسمى (personal action) للإنصاف إذا ما إنتهكت حقوقها . كذلك فقد أسبغ التشريع حماية إدارية تمارسها دائرة التجـارة والصناعة (the Department of Trade and Industry) فى إنجلترا ، بينما أوكل المشرع فى السودان هذا النوع من الحماية للمسجل التجارى العام.

Chapter (1)
The Company and Membership

Introduction:

Many activities in our recent life require the work of large business, each of which has access to immense amount of capitals. For gaining access to large amounts of capitals individual proprietorship and partnership may be inadequate. By forming a company large fund of capital can be brought under one management, for this reason the company has become the most important form of organizations of business. Another basic reason is that the shareholder of a company may enjoy a very important merit, the limited liability, which attracts investors to invest their money without fear about their private properties. Company form plays a very important role in our life economically, socially and, indeed, legally.

What is the meaning of the word "company"? Both etymologically, and as a legal terminology, who are the members of the company? Real questions may be arising. It seems that no simple answer for these questions without vestigial research in the company history from the earliest centuries, and through the medieval centuries till the recent century. The evidence that company represents one of the most important associations in our life require an exposition for it's different roles, therefore, this chapter deals with the Definition of the company, History of companies, Company and partnership, Separate legal entity of the company, Importance of the company and the Membership of the company.

(i) Definition of Company

1- In the English Law:

There is no objective legal definition for the word "company". "Although company law is well recognized subject in the legal curriculums and the titles of voluminous literature, its exact scope is vague, since the word "company" has no strict legal meaning"[1]. The term implies an association of number of people for some common object or objects. "But in common parlance the word

[1] - L.C.B – Gower. *Gower's Principles of Modern Company Law*, at. 3 (4th ed. "1979").

company is normally reserved for those associated for economic purpose *i.e.* to carry on business for gain "[2].

At the present time there are two basic legal frameworks for persons who wish to form an association with object of carrying on business, namely partnerships and companies. Partnerships are based on mutual trust and confidence, partnerships therefore are suitable for a relatively small numbers of persons who know and trust each other. In England the Partnership Act 1890 defined partnership as "the relationship which subsists between persons carrying on a business in common with a view of profits and which is not, *e.g.* the relation between members of a company registered under the Companies Acts or incorporated by, or, in pursuance of any other Act of Parliament or Royal Charter "[3]. Since such a basis would be impractical for larger more complicated organizations, the law has over many years allowed the development of many types of companies. In the English law now there are three types of companies, classified according to their means of formation.

(a) Chartered Companies:

A chartered company is formed by the grant of a charter by the Crown under the royal prerogative or under statutory powers. This method of incorporation is no longer used by trading companies since it is quicker and cheaper to obtain incorporation by registration[4].Now this method of incorporation is only used by organizations formed for charitable or quasi-charitable objects.

(b) Statutory Companies:

In the past such companies were incorporated by special Act of Parliament when it was necessary for them to have special powers and monopolistic rights. This was the case when the supply of public services such as gas, water, electricity or rail – ways was left to private enterprises[5] . After this period public corporations were formed to hold such activities, but recently the most of public services have been "privatized ".

(c) Registered Companies:

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[2] - Id. at 3.
[3] - Geoffrey Morse, *Charles worth & Morse Company Law* at.3 (16th ed. "1999").
[4] - L.C.B Gower, supra note *1* at 7.
[5] - Id. at 7.

A registered company is the company which is incorporated by registration under the companies Act[6].
In England the Companies Act provides for the registration of companies limited by guarantee, and unlimited companies and for companies limited by shares.

Companies limited by guarantee and unlimited companies reflect a real lack of their economic importance, the former because; it formed "for purpose other than the profit of its members *i.e.* those formed for social, charitable or quasi-charitable purposes "[7].and the latter because of its unlimited liability.

The vast majority of companies in England and Sudan and the most important type of registered companies are the "companies limited by shares", both public and private. In such companies the capital divided into shares and the members of a company are liable to pay for their shares. People usually prefer the forming of company in order to protect their private properties from the claims of the company's creditors. Once they have paid for their shares, they are under no further liability and the company said to be (limited by shares).

It is very important to be noticed here that our thesis will be focused only in the companies limited by shares because of its importance in our economic and legal life.

2- In the United States Law:

In the United States the word "corporation" comes from the Latin word "corpus" *i.e.* person, this "person" is created when a charter for its existence is issued by State Government. Because there is no one Federal law for corporation, the Model Business Corporation Act had been proposed by the American Advocates Association to be adopted by the American legislature, but it was a mere proposal to create a unification for different corporation laws in the United States of America[8]. Corporations (companies) in the United States of America has no one definition, and the United States' corporation rules depend on the Federal statutes, that any state has it's own statutes about corporation, but there are main similar features that enable writers to define the word corporation as " an artificial person, created under the statutes of a state or a

[6] - Geoffrey Morse, supra note *3* at 3.
[7] - L.C.B. Gower, *supra note1* at 11.
[8] - (This model defined Corporation as artificial being, invisible, intangible and existing only in contemplation of law): (Smith & Roberson's *Business Law Uniform Commercial Code*, at 668 (5th ed). Pub. West Publishing Company- New York.

nation, organized for the purpose set out in the application for corporate existence "[9].

In all state statutes there is no distinction between the large public corporations which include millions of shares, and the private small family corporations.

3- In the Sudanese Law:

The Sudanese Company Act 1925 was derived from the English companies Act (ECA) 1908, therefore, also there is no specific definition for the word " company ", but from s.2 (5) we can imply that the legislature defined "company" just from a formal point of view as: "any company incorporated and registered under the provisions of this Act, and the liability of it's members extends only to their unpaid shares". The Sudanese company Act provides that the company may be public or private.

In 1984, The Civil Transactions Act was passed, and in a serious drawback the legislature defined the company in S.244 as "a contract whereby, two persons, or more, agree to contribute in a business, and to distribute the profits or to bear the losses resulted from this business. The 1984 Civil Transactions Act was derived from the Jordanian law and passed for the purpose of "Islamization" of the Sudanese laws. Although the (SCA) 1925 was not yet repealed, the legislature in the Civil Transactions Act 1984 provided for the principle of the "separate legal entity" for some types of Islamic companies.

The Civil Transactions Act 1984 may be suitable for partnerships not companies, but the legislature did not state for this expressly in the Act, a thing which will create a climate favorable for confusions and contradictions in the judgments.

(ii) History of Companies:

There is no exact moment of recorded history to specify the existence of the first form of company, but some evidence suggests that people recognized the concept of corporate personality to some extent as early as the time of *Hammurabi* " *about 2083* B.C "[10]. Also by the Roman times a feature of corporateness had appeared through imperial *FIAT*. This means that the concept of corporateness had created depended on legislations[11]. This legislative nature of company personality may

[9] - D.D. Davidson & B.Knowles. & L.Forsythe. & R.R. Jeperson. – *Business Law Principles and Cases* at 635 (2nd ed "1991").
[10] - Id at 636.
[11] - Id at 636.

justify the recent concept of the company as a separate person with legal entity distinct from the entity of its shareholders.

In England the earliest trade associations existed in the medieval times[12]. They were Guilds of merchants, some of them hoped to obtain monopolies over local trades or over particular commodity, and the only way for incorporations at that time was to obtain a charter from the Crown, but these Guilds did not resemble the modern companies, since that the members traded on their own names, and were liable to their own debts.

The Joint Stock Companies emerged in the 17th century "*stock here means stock in trade, not stocks and shares* [13]". *I.e.* in addition to trade on their own accounts, the members would operate a joint account with joint stock. Many of these Joint Stock Companies were large and powerful monopolies. By this time there were two methods of incorporation, either by charter, or special Act of the Parliament. The Joint Stock Companies possessed some of the advantages of incorporation, for example they would sue the outsiders on their own names, but they did not possess the main advantage of recent company, *i.e.* the limitation of member's liability that the creditors of the company had access to the member's private assets. And the creditors would be allowed to takeover the company's rights to recover sum due from members as in the early English case, (Salmon v. Ham borough Co. "1671")[14].

In second half of the 17th century the large monopolistic companies began to decline[15], and there was a boom of formation of companies concerned with domestic trade. In many cases the procedure for obtaining charter was far too slow, and also expensive. Companies were formed, therefore based on contract. The contract would include rules for the conduct of members, and provide for the transfer of shares. In law such bodies basically regarded as partnerships and the liability of members was unlimited. The domestic companies became unpopular with the legislature, mainly because of the activities of fraudulent promoters and shareholder, for example promoters would acquire charters from obsolete companies.

In order to check the boom in speculative and fraudulent companies the Bubble Act 1720 was passed[16]. Exactly what

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[12] - L.C.B Gower, *supra note1.* at 22.
[13] - R.R.Pennington. *Pennington's Company Law* at 5 (3rd ed. "1973").
[14] - [1671] 1.Ch. Cas 204.
[15] - L.C.B Gower, supra note *1* at 28.
[16] - Id at 30.

intended was not clear, the examples were given including purporting to act under obsolete charters, or the transfer of shares without authority of Act of Parliament, and the brokers dealing in securities of illegal companies were liable to penalties. The effect of Bubble Act was to suppress business association, and make it difficult for them to obtain corporate form[17], therefore between passing the Bubble Act in 1720, and its repeal in 1825 only various types of partnerships were formed as a form of several persons agree to be associated in an enterprise with joint stock.

In 1837 the Chartered Companies Act empowered the Crown to grant letters patent *i.e.* to grant privileges of incorporation without actually granting a charter. However, such associations were not regarded as corporate bodies, and although member's liability was limited, any judgment against the company would be enforced against every member until three years after his membership has ceased.

Between 1844, and 1855, there was a great pressure for limited liability. In 1855 the limited liability Act was passed, and introduced, subject to several conditions, companies liability limited by shares. This Act was repeal by the Joint Stock Company Act 1856, which retained the limited liability[18], it also introduced the modern shape of the company.

The companies Act 1862, was the first modern Act. It contained more than 200 sections, and repealed and consolidated all the previous Acts. 1862 Act was followed by numerous amending Acts and consolidating Acts in 1908 and 1927.

The basis for the present legislation is the companies Act 1948, it contains over 450 sections. This Act was amended and new provisions were introduced by companies Act 1967, 1976, 1980 and 1981. The confusion caused by having five major Acts leaded to pressure for consolidation of company legislation. The consolidation came into force on 1st of July 1985, it consist one of major Act and three satellite Acts *(the insider dealing Act 1985*, *The Business Names Act 1985 and The Companies consolidation Act 1985*).

Through the latter half of 19th century judicial decisions played a very important role in the development of many principles of company law, for example :-

* (Foss v. Harbottle " 1843"[19]) –

[17] - Id at 31.
[18] - Id. at 39.
[19] - [1856] Hare 461.

{*Where a wrong is done to a company, the company, not individual member, is the proper plaintiff*}.
* (Royal British Bank v. Turquand "1856"[20]) –
{When *a person deals with a company in transaction which is not inconsistent with the registered documents, he can enforce the transaction against the company despite any irregularity of internal management}*.
* (Ooregum Gold mining Co. v. Roper " 1892"[21]) –
{a *company can not issue shares as discount*}.
* (Salomon v. Salomon & Co. "1897"[22]) –
{*Which established the legality of the incorporation of small business where one person holds the vast majority of the shares}*.

In our humble view, the role of modern judgments in the field of company law also should not be underestimated.

(iii) Company and Partnership:

There are two frameworks allowed to a person to carry on a business as an association, namely companies and partnerships. The distinction between companies and partnerships is often merely one of machinery and not of a function. If small number of persons wish to carry on business in common with a view to profit they may either form themselves into partnership or a company, " the only restraint on their freedom of their choice is that if their numbers are too great for that mutual trust appropriate to partnership, they must form a company"[23], " but it must be noticed in each choice, the company is more advantageous form of business association from the point of view of the member or the shareholder"[24]. That means not that partnership has no advantages. Partnership has its advantages, so, there must be a comparison between the two frameworks of business associations.

1- Advantages of the registered company:

A registered company has many advantages over partnership these are:

[20] - [1856] 6 E. & B 327.
[21] - [1892] A.C. 125.
[22] - [1897] A.C. 22.
[23] - L.C.B, Gower, *supra note 1* at 5.
[24-] - R.R. Pennington, supra *note 13* at 3.
[25] - Geoffrey Morse, *supra note 3* at 25.

(a) The separate legal entity of the registered company:

A registered company is a corporation *i.e.* a separate legal person distinct from it's members, whereas the partnership is merely aggregate of the partners and as a consequences for this, *firstly*: the owners of shares in the company may enjoy the limited liability, this means that the owner can not lose more money than he has invested in the company, whereas, in partnership every partner is jointly and severally liable with other partners for all debts and obligations incurred while he is a partner. *Secondly:* unless it is wound up, a registered company continues in existence so that it is not affected by the death, bankruptcy and mental disorder of its member. On the other hand in the case of partnership on the death, bankruptcy of a partner, subject to any agreement between the partners, the partnership is dissolved, " in practice the share of partner who dies, or retires has to be taken out of the business, or provided for by the other partners, and this may cause serious financial problems to the firm "[25]. *Thirdly*: the property of registered company belongs to the company, so that there is no change on the ownership, or in the formal title of the company, but in a partnership the property belongs to the partners and vested in them, consequently there are changes in the ownership and in the formal title. *Fourthly:* A registered company can contract with the members without any restriction. *Fifthly*, each partner is normally an agent for the firm for the purpose of the business of the partnership and, subject to any agreement to the contrary between the parties, may take part in the management of the partnership business, while the members of registered company as such are not agent, and have no power to manage it's affairs, but the directors are agents and managers *i.e.* they have powers given to them by the articles. *Sixthly:* In public companies, shares are transferable and can be mortgaged without consent of the other shareholders (but the articles of a private company may impose restrictions on the transfer of shares. For example, articles may give existing members the right to buy the shares of a member who leaves). In partnership and subject to any agreement to the contrary, a person can not be introduced as a partner without consent of the other partners.

*(b) Preferred Taxation***:**

In some countries companies have more preferred treatment in taxations than that of partnership and individual proprietor[26]. (Basically to encourage the investors to invest in a company form)

(c) Number of Members:

There is no limitation for the number of members in the public company form, but with some exceptions, partnership with more than a certain number of partners is prohibited in most of countries (but also in private companies there may be a limitation of number of members in the most laws of different countries).

2-Advantages of the Partnership:

Partnerships advantages over company are rare, and most of them deal with some formalities, for example a fewer formalities are to be observed in the formation of the partnership, less publicity than that required for company, no need to file a memorandum or articles with the registrar of companies while memorandum and article are two basic requirements for incorporation of a company and partnership accounts are not open to public inspection[27].

(iv)The Legal Entity Of The Company And The limited Liability:

The most important consequence of incorporation of company is that the company becomes a legal personality. The separate personality (entity) of the company is an important principle in the English law since that "a legal person is a being that the law regards as capable of having rights and duties .English law recognizes two types of full legal persons : natural persons and corporations. Corporations are artificial entities which the law deems to exist once certain procedures for their creation have been complied with "[28]. Therefore, the company is a person in the eyes of the law quite distinct from the individuals who are its member. That means the company can own property, enter into contracts or suffer wrongs, sue and be sued in its own name[29].

The case which clearly established the independent legal personality of the company is (Salomon v. Salomon & Co. Ltd.)[30]. In this case: Salomon formed a limited company with other

[26] - R.R.Pennington, *supra note 13* at 5.
[27] - Geoffrey Morse, *supra note 3* at 27.
[28] - Clive R.Newton. *General Principles of Law* at134 (2nd ed. "1977").
[29] - R.R.Pennington, *supra note 13* at 1.
[30] - [1897] A.C.22.

members of his family, and sold his private business to the company for £ 39,000, he held £20,001 of the £20,007 shares which had been issued by the company , and £10000 of debentures , about a year after its formation the company was wound – up. The assets at that time were just sufficient to discharge the debentures, but nothing was left for the unsecured creditors with debts of about £ 7500. The creditors claimed that they should have priority because Salomon and the company were in effect the same person. The House of Lords held that Salomon and the company were separate legal entities, the company had been validly formed, and there was no fraud on the members and creditors. Salomon was therefore entitled to the remaining assets. Lord Mac_ Naugten was stated:

> *"The company is at law a different person altogether form those forming the company and , though it may be that after incorporation , The business is precisely the same as it was before , and the same persons are manager ,and the same hands receive the profits , the company is not in agent of the subscribers or trustee for them . Nor as the subscribers as member liable, in any shape of form, except to the extent and in the manner provided by the Act"*[31].

The invention of the separate legal personality of the company is vital as it means that it is free to develop as an instrument of business shaped by both peoples involved in its running and those who brought it into existence[32].

There has been considerable dispute about the true nature of the company personality and several theories have thought to explain the nature what it means, that the company remains an artificial creation which can only function if it has real persons to act for it and make decisions on its behalf. Professor O.S Hiner summarized the different theories of the nature of the company as follow[33]:-

> *"The fiction theory makes the proposition that the grant of legal personality to company is a grant to an entity which has no mind or will of its own. The law imputes to a company personality which is fictitious determined solely by what the law prescribes: it is not personality that enables a company to act willfully or intentionally as real persons do.*

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[31] - Janet Dine – *Company Law* at 23 (4th ed. "2001") .
[32] -Id.at 24.
[33] - O.S Hiner, *Business Administration, an Introductory Study* at 6, 7 (1st ed. "1968").

But this theory could be argued against by that in many countries it is clear that companies can do wrongs and be punished for doing so.

The bracket theory states that while human beings can have personal interests and individual rights, a company can not, it is simply a legal device to enable certain complex relationships to be more easily defined and understood. When people form a company, it is convenient to give them collective identity and to enclose them , so to speak , in brackets to which distinctive name is attached , but at any time it may be necessary to remove the brackets before the real position of the company can be known. While it is true that the veil of incorporation must often be lifted and the façade of the legal entity in order to discover the true state of affairs the full acceptance of bracket theory would deny the feasibility and desirability of distinguishing between the rights, duties and assents of corporate entities whose creation is sanctioned by law and those of persons who associate to create them. The conclusions that can be drawn form this theory have not commended themselves to British courts.

In contrast to the fiction theory the realist theory consider the company as an organism with character and spirit of its own, one part of the organism acting as ahead, another as the trunk and others as the limbs. It is argued that the reason we possess as individual has its counterpart in the reason of an incorporated group also can have its own will, purpose and honor. but it has not been proved that the group has a unique mental unity outside the minds of it is members , and if a company compared with a human being made the bearer of natural rights , and deemed to have mind and will of its own , some strange results may follow".

The consequences of the separate personality are many but the most important of them:-

(a) The Separation of Ownership and the Management:

The famous research of Berle and Means, (A.Berle and G. Means, The Modern Corporation and Private Property_ New York, 1932)[34]. Showed that the identification of the shareholders with the company is no longer represented the reality. That means by 1932 the concept of the separate legal entity of the company distinct

[34] - Janet Dine ,*supra note 30*, at 25.

from it's member became a common concept and the ownership and control of professional management of the company are totally different concepts and the company should be regarded more and more as a person has its own rights and this person must struggle to identify what are its interests as an entity quietly distinct from its owners.

(b) Perpetual Succession:

The continuity of the company is not affected by the death or incapacity of some or all of its members. This is one of the obvious advantages of the (company)[35].

(c) Increased Borrowing Powers:

It is logical to assume that unlimited partnerships would find it easier to borrow money because of their unlimited liability. This is not the case since a company can borrow money more easily than a partnership and it can give as security for its debentures a floating charge. This is not available to partnership. A floating charge is a mortgage over the constantly fluctuating assets of a company. It does not prevent the company dealing with these assets in the ordinary course of business. Such a charge is very useful when a company has no fixed assets such as land which can be included in a normal mortgage, but never the less has a large and valuable stock – in- trade[36].

(d) Transferable Shares:

Incorporation greatly facilitates the transfer of member's interest. Shares are items of property which are freely transferable provided the constitution of the company does not contain an express provision to the contrary. Moreover, in the absence of limited liability the opportunity of transfer would be in practice much restricted[37].

(e) Suing and being sued:-

This consequence of the separate legal entity of the company is related to the legal actions and specifically in contracts.Companies has contractual capacity and can sue and be sued on their contracts. In our humble view, one of the main features of the separate legal entity of the company appears in that the company can be sued even criminally. In Sudan, Elsadiq

[35] - Id at 25
[36] -L.C.B. Gower, *supra note 1* at 107.
[37] - Id. at 106

Salman J. in (S. G. v Abdelraouf Osman & Others "1978") S.L.J.R, 34 said:

> *"Beyond the doubt the artificial person, as a legal entity, is criminally liable and subject to the criminal punishment as well as the natural person."*

S.3 of the Sudanese Criminal Act 1991 defined the word "person" to include the natural person, committee, company or group of persons.

(f) The limited liability:-

The most important and the greater consequence of the separate personality of a company is the limited liability. When a company formed on the basis of limited liability, its members are not liable for the company's debts. Complete absence of liability is not permitted and such member is liable to contribute, if called upon to do so, the full nominal value of his shares which has not already been paid[38].

The 1855 (ECA) limited the liability of a member of a company to the amount not paid up on his shares, for example: if Mr. X purchases one share of £ 50 and has paid so far only £ 30, then he is required to pay further £ 20 to see that he has paid in all £ 50. He is liable to pay not exceeding £ 50 (being the nominal value of the shares he has purchased). It should be noticed that the shareholder of a limited company is free of his liability the moment his share is fully paid- up and hence his private property can not be seized in the event of winding –up the company for the payment of its debts[39].

The consequences of the limited liability were greatly to broaden the flow of finance and commerce. It enabled investors to minimize the risks of finance by spreading their holdings over a number of businesses, a policy which in the days of unlimited liability would only have magnified the hazards of investment[40]. Limited liability was thus the instrument by which the field of investment in companies was favored for the very wealthy and those of more modest means. Limited liability assisted in the development of large scale businesses organization and facilitated the development of the inter-company network[41] . Why so important? A question which could be answered by that: a huge proportion of the world's wealth is generated by companies, and

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[38] - Id. at 101.
[39] - B.K.A charya & P.B. Govekar, *Company Law and Secretarial Practice*, at 21 (2nd ed."1984").
[40] - H.B.Rose – *Economic Background to Investment* at 137. (1st ed. "1960").
[41] - Id at 137.

companies are most often used by people as a tool of running commercial enterprises. Many of these businesses start in a small way, often by co-operation between a small numbers of people[42].

There are some criticisms against the limited liability of the company as a consequence of the separate personality of the company, and against the separate personality itself. The main criticism against the limited liability is that it constitutes a great risk for those who deal with the company, but this can be justified on the ground that persons who deal with limited company know the risks although it is not usually practical to take all the available precautions, such as a search of the company's file at the registrar office. The criticism against the separate personality is that it may be abused by those purporting to fraud under the name of the company. The decision in Salomon V. Salomon itself had been criticized by this reason. Other criticism against the separate personality is that it is not "in many events" beneficial for the company's member[43] as in the English case (Macura v. Northem Assurance "1925")[44] (Macura owned a timber estate, He formed a limited company and sold the timber estate to it. like Salomon he was basically a " one –man " company. Before he sold the estate to the company, it had been insured in his own name. After the sale to the company he neglected to transfer the insurance policy to the company. The estate was destroyed by fire. It was held that Macura could not claim under the policy because the assets that were damaged belonged to a different person, namely the company, and Macura, as a shareholder, had no insurable interest in the assets of the company.

Despite these criticisms we believe that the separate legal personality of the company remains a great innovation which encourages people to invest their savings in a company from and all criticisms are of less importance when compared with the advantages of the separate personality of the company.

(v) The Importance of the Company:-

In the recent time, companies play considerable roles in our life, for example in the economic development, international competitive advantages and the share of the company play a very important role as a means of wealth.

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[42] - Janet Dine, *supra note 31* at 1.
[43] - Id. at .28
[44] - [1925] A.C. 619.

1-The Role of Company in Economic Development:

The role of company in the economic development is substantial one, especially in building of infrastructural projects and other greatest projects. By its nature as a firm of collection of financial sources, the company must take the leadership of establishing the mentioned projects that these types of investments can not (or *rarely*) be established by the individuals.

The developed countries had early understood the lessons of the incorporation of companies, that which put them on the leadership of the world, both economically and politically. With statistical economical point of view we can examine the role of companies in the largest economy in the world, the United States of America economy, " In 1984, corporations in the United States of America produced ($ 2, 77.2) billions worth of product and services. This production coupled with fact that corporations made ($ 235.7) billions of profit taxes in 1984, graphically illustrates that corporations currently represent a vitally form of business organizations in the United States. An understanding of the essential of the formation of corporation therefore seems warranted "[45]. And in the different kinds of the economical activities in the United States we find that "corporations represent 98% of total manufacturing and their role in services is about 50% "[46].

The manufacturing companies reflect lack of their importance in the economies of the least-developing countries, while the services companies reflect a high level of importance, for example, in transportation, airlines, or communication (the basic elements of national economic development), " the difference between manufacturing and services companies in the least-developing countries is too great, in fact the comparing between them may seem futile, yet the product and manufacturing is no deeply rooted in the least- developing countries"[47].

2-The Role of the Company in the International Competitive Advantages:

[45] - D.D. Davidson & B.Knowles. & L.Forsythe. & R.R. Jeperson. –*supra note 9* at 635.

[46] - D.V. Vagts, *Basic Corporation Law* at 5 (1st ed. " 1973").

[47] - J.C.Show – *Developing Wining, Plans For Service Companies* at 23 (1st ed. "1990").

By the collapse of the communism at the end of the past century, the free economies such as the western economies and South Asian economies took the leadership of the international economies. The term "Globalization" became familiar in many different fields, but basically in the global economic competition.

All nations now must prepare powerful firms for the purpose of the global competition. Companies, indeed, are the most important means which should be prepared for facing the globalization challenge that "companies not nations, are on the front line of international competition, they must increasingly compete globally. Yet globalization does not supersede the importance of nations. The home- base shapes a company's capacity to innovate rapidly in technology and methods, and to do so in proper direction. It is the place from which competitive advantage ultimately emanates and from which it must be sustained"[48]. The home- base of a company includes the company's national legislations which should be modernized and updated to satisfy the requirements of the international competition that the company can not compete globally without exploiting its home –base advantages[49].

The internal strategy of a company must be directed to the purpose of the international competition, *i.e.* to make its "sustainable advantages obsolete even while they are still advantages "[50].

Despite the fact that the English Companies Law 1908 (from which the Sudanese Company Law 1925 was derived) had been developed many times through many decades to accommodate the development in the economic and legal activities, the Sudanese company law still frozen regardless of the changes in the Sudanese economy, or the international economical progress of the world around the Sudan.

3-The Role of the Company's Share as a Means of Wealth:

A share was defined in the early English case : (Borland's Trustee v. Steel " 1901"[51]) as " the interest of the shareholder in the company, measured by a sum of money for the purpose of liability in the first place and of interest in the second, but also

[48] - Mechael. E.Porter – *The Competitive Advantages of Nations* at 577 (1st ed. "1990").
[49] - Id. at 582.
[50] - Id. at 582.
[51] - [1901] 1 Ch. 279.

consisting of a series of mutual covenants entered into by the shareholder[52] ".

There are two types of shares, ordinary shares and preference shares. Preference shares are designed to appeal to investors who want steady return on their capital combined with a high level of safety. The main difference between the ordinary share and preference share is that the owner of the former is a member of the company and the owner of the latter is regarded as a temporary member of the company.

Nowadays, a share of a company may result in wealth to its holder in the case of successful, well-managed company. In public companies the shares are to be listed in a stock- exchange, for example, (London Stock Exchange, New York Stock Exchange and Khartoum Stock Exchange); these markets provide a convenient market for the sale of shares. In most of countries the stock-exchange require full financial reports from the listed companies for the use of investors, this requirement enables investors to select their options in the shares depending on a solid ground. The share also may be selected for growth, which an investor is free to select between those of high dividends, or of growth (which pay little, or no dividends, but stand to rise in price) "most investment counselors agree that young people should choose strategy of capital growth "[53].

(vi) The Company and Membership:-

By forming a company, company members are entitled to enjoy some rights conferred on them by law and also to bear some liabilities. For the first look one may think that persons who are entitled to rights and liabilities are only those called "shareholders" , but in fact, and from legal view point, other categories of persons may enjoy or bear these rights or liabilities in addition to share holders that " members of a company are its shareholders (the two expressions may be used interchangeably without harm) provided that it is remembered that in some situations a person may be a member of a company without being a shareholder (in the case of company limited by guarantee) , or a shareholder without being a member (in the case of company limited by

[52] - Geoffrey Morse, *supra note 3* at 177.
[53] - Marshall Loeb, *Marshall Loeb's Money Guide*, at 292 (1st ed."1983").

shares)" [54]. Since that our thesis will be concerned with companies limited by shares, we believe that the basis of equality in a company is its membership not merely the ownership of its shares, that the former is wider than the latter. Membership includes in addition to the share holders other categories of persons, so we need an exposition to show who those persons are.

The subscribers to the memorandum of association are deemed to be members of the company and their names must be entered into the register of members, but some persons may become members by methods other than this.

Section 27 of the Sudanese companies Act (SCA) 1925 and section 352 of the (ECA) 1985 provides that every company must keep a register of its members, and the addresses of members, and the date in which each person entered in the register as a member and the date at which any person ceased to be member[55]. From the above requirements of the register we can imply that the legislature considered the shareholder just as "one" of many members of the company, so in this part we will be concerned with the ways of becoming a member, who can become a member and the register of members.

1-Ways of Becoming Member:

(a)Subscribers to the memorandum

"A subscriber to the memorandum becomes a member on registration of the company, and an entry in the register of members is not necessary to make him a member of the company "[56]. An entry to the subscriber's name in the register is a duty of company directors (s. 20 of the (SCA) 1925), but he cannot escape from the liability for calls in the shares for which he has signed the memorandum, and the obligations of the subscriber to take the shares which he has subscribed is not satisfied by the later allotment of shares credited as fully paid and to which some one else is entitled [57] as in Migotti case (1876)[58]

(b) Directors who have signed and delivered to the registrar an undertaking to take and pay for their qualification shares (ss.77, 78 of the (SCA) 1925.)

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[54] - R.R Pennington. *Supra note 13* at 1.
[55] - Geoffrey Morse. *Supra note 3* at 163.
[56] - Id at 158.
[57] - Id at 158.
[58] - [1876] L.R. 4EQ.238.

(c) Every other person who agrees to become a member and whose name entered on the register of members (s. 26 "2" of the (SCA) 1925)

A person cannot become a member under this category unless he agrees to do. The agreement of a subscriber for shares is always expressed in his application for them, and the agreement of renounce of a letter of allotment by his completing the application form on it, but if a person acquired shares from an existing member, the instrument of transfer used to state that he agree to accept the shares [59] " and his execution of the instrument containing that statement evidenced his agreement to become a member "[60]. A person of his category does not actually become a member until his name is entered in the register of members. Such a person may take the allotment of his shares direct from the company or may purchase shares from an existing member, or he may succeed to share on the death or bankruptcy of a member.[61]

2- Who can be members:-

(a) Minors:

In Sudan by s.55 of the Civil Transactions Act 1984 and in the English Law a minor, i*.e.* a person under the age of 18 may be a member unless this is forbidden by the articles and the minor contract to take shares is avoidable by him before or within a reasonable time after he attains the age of 18[62]. That means a minor who has been registered as a member may repudiate his membership before or within a reasonable time after reaching the age of maturity. But he cannot recover the money paid unless there has been a total failure of the consideration of which the company was paid, as in the English case :(Steinberg v. Scala Ltd.)[63] , in this case a minor purchased some shares. When the company made a call she repudiated the contract and attempted to recover the money paid for the shares. It was held that she did not have to pay the call, but she could not recover the money paid because there had not been a total failure of consideration. She had received something for her money, *i.e.* the right to vote and receive dividends.

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[59] - R.R Pennington, *supra note 13* at 283.
[60] - Id at 238.
[61] - Geoffrey Morse, *supra note 3* at 159.
[62] - Id at 150.
[63] -[1923] 2Ch.452,CA

(b)Personal representatives (Table A. reg.22 of the (SCA) 1925):

On a member's death his shares vest in his personal representative who may acquire registration of himself as a member. If a personal representative is registered as a member he is entitled to vote and he is personally liable for calls although he may claim an indemnity out of the deceased assets.

A personal representative is not obliged to become a member for Table A. reg. 23 of the (SCA) 1925 and s. 183(3) of the (ECA) 1985 provide that the legal representative may make a valid transfer of the deceased's shares without becoming a member and to receive all dividends, bonus of other benefits from the share, but the articles usually prevent them from voting at general meetings.[64]

If the personal representative neither registers as a member, nor transfer the shares, the deceased remains in the register.

In our humble view to avoid this practice, the registrar must require the personal representative of the deceased either to transfer the shares to other person or register as a member within a fixed period of time.

(c)Trustee in Bankruptcy (s. 151 of the (SCA) 1925.):

The position of a trustee on bankruptcy is similar to that of personal representative in that he can transfer the shares without being registered as a member, or he can acquire registration .

A bankrupt may be a member of a company although the beneficial interest in his shares will be vested in his trustee in bankruptcy as from the time when he is adjudged bankrupt unless the articles provide to the contrary[65]

3-The Register of Members:-

The register of members is compulsory for every company. Sufficient Information contained therein must be up to date and clear. The entry on the register is considered the crucial test of determining the membership of a person .Hence every change effected in the case of a member must be incorporated as early as possible .Further, the register is open for public inspection and extracts are to be given if demanded by any person.

[64] - Geoffrey Morse, *supra note 3* at 161.
[65] - Id at 162.

S. 27"2" in the (SCA) and s.352 in the (ECA) 1985 provide that every company must keep a register of members which must contain the following particulars:

(a) The name and address of each member.

(b) A statement of shares held by each member, with distinguishing. Numbers (if any). Where the company has more than one class of issued shares they must be distinguished by classes.

(c) The amount paid up on shares.

(d) The date of entry on the register.

(e) The date of cessation of membership

By s. 352 of the (ECA) if the number of members of a company falls to one, a statement to that effect must be entered in the register, together with the date of the occurrence .If the member ship of such a company then increases to two or more the occurrence of the event, its date and the name and address of person who was formerly the sole number, shall be entered in the register.

S.32"1" in the (SCA) 1925 and s. 353 in the (ECA) 1985 require the register to be kept at the registered office, unless it is made up at some other place in which case it can be kept at that other place. The registrar must be informed of where the register is kept, and of any change in that place.

By s. 354 every company with more than 50 members must keep an index of members showing how each member can be readily found in the register.

By s. 32 of the (SCA) and s. 356 of the (ECA) 1985 members may inspect the register free of charge. Non-member may inspect the register on payment of small fees. Any person may require a copy of the register with payment of fees.

By s. 33 of the (SCA) 1925 and s.358 of the (ECA) 1985 the company may close the register for up to 30 days each year. The company must give notice in a newspaper circulating in the district where the registered office is situated. The effect of closure is that share transfers are not entered in this period and the public may not inspect the register. The purpose is to keep the register static while dividend warrants are prepared. In practice very few companies close their register; they declare a dividend payable to members of the register at a future date and then extract a list of members at that date.

By s.34"1" of the (SCA) 1925 and s. 359 of the (ECA) 1985 the name of a person without sufficient cause entered in or omitted from the register or, in the case of default or delay takes place in

entering the cessation of a person's membership, then on the application of either the aggrieved person, any member and the company ; the court may order rectification of the register and the payment of damages by the company to the aggrieved person .The power to rectify the register is not restricted to the above circumstances, rectification may be granted whenever the register is incorrect, and the fact that is in liquidation does not prevent rectification .

A company may remove from the register any entry that relates to a former member provided that person has not been a member for at least 20 years.

By s.29 of the (SCA) 1925 and s. 360 of the (ECA) 1985 no notice of a trust shall be entered on the register. For example, a man buys shares for his infants cannot enter a notice of a trust.

In both Sudan and England the owner of a beneficial (equitable interest) in shares, for example an equitable mortgagee or the recipient of a bequest of shares, may protect his interests by serving a "stop notice" on the company.

Conclusion:

Despite the fact that there is no objective definition for the word "company" in the Sudanese and (ECA)s, company remains a very important word in our legal, economical and social life. Company did not emerge by accident, but resulted from long historical developments.

For gaining access to large amounts of money, individual proprietorship and partnership may be inadequate but by forming a company, large funds of money can be brought under one management.

The innovation of the separate legal entity of the company remains one of the most important innovations through all the human history. The main feature for the legal entity of the company is the limited liability which attracts people to invest their money in a company form without fear about their other properties.

Membership of a company is the virtue of the rights in such company. The familiar forms for becoming a member are represented in the subscriber to the memorandum; directors who have signed and delivered to the Registrar an undertaking to take and pay for their qualification shares and every other person who agrees to become a member and whose name entered on the register of members. Minors, personal representatives and trustee in bankruptcy also can be members in a company for different considerations.

Chapter (2)

Preferentiality and Equality in Shareholders' Rights

Introduction:

It's well known that in the different company laws and specifically in the English law that a share does not confer its owner a right to the physical possession of any thing. It confers number of rights against the company, for example to attend company's meetings and vote. The face value of the share is also a measure of the shareholder's interest in the company. In the case of winding up the company the amount that will come to any shareholder will be proportionate to the face values of the shares owned by him. But the question of the legal nature of the share remains a very important question.

In the English law there is a presumption to the equality of rights between the shareholders unless there is evidence to otherwise. That means the memorandum, articles or the documents describing the shares when they were issued may describe other types of shares in addition to the ordinary shares. These types of shares called "preference share" and they confer on their holders' priority to some rights over the ordinary shareholders. Here the important question which may arise is what the rights of the shareholders are, and what are the limits of the presumption of the equality of rights between the share holders?. To answer these questions there must be an exposition to the rights of the shareholder generally, and to explain the presumption of the equality between the shareholders and its exceptions, so this chapter will be concerned with the legal nature of the share and its definition, the types of company shares, the rights of the shareholder (fundamental rights and other rights) and lastly the presumption of equality between the shareholders and its exceptions in concern with some rights.

(i)The legal nature of the share:-

What is the exact juridical nature of the share? this a question more easily asked than answered [66].In the old types of companies in England(which was a merely an enlarged partnerships) it was clear that the members' shares entitled them to an equitable interest in the company's assets, but the nature of

[66] - L.C.B Gower, *Gower's Principles of Modern Company Law*, at 387(4th ed. 1979).

this equitable interest was not quite clear that the members could not , while the company was going concern, lay claim to any particular asset, or prevent the directors from disposing of it[67] .Also in the recent time the shareholder have ceased to be regarded as having equitable interests in the companies assets, and this is one of the most important consequences of the separate personality of the company doctrine, and as a consequence for this doctrine the shareholders are not in the eye of law part owners of the undertaking ,and the word share become something of a misnomer, for shareholders no longer share any property in common ; at the most they share certain rights in respect of dividends, return of capital on a winding up, voting, and the like[68].

Some opinions defined the share as a mere contractual right depending on the fact that the memorandum and articles of association constitute a contract of some sort between the company and its members and it is these documents which directly or indirectly define the rights conferred by the shares. But it seems that the share is something more far than mere contractual right and this can be implied from the rules related to the infant shareholders who are liable for calls on the share unless they repudiate the allotment during infancy, and who can not recover any money which they have paid unless the shares have been completely valueless[69].

Farwell J. in the famous English case: (Borland's Trustee v. Steel& Co. Ltd) [70]defined the share as

> *"the interest of shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders".* According to this definition the followings should be noted:
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> 1. "Measured by a sum of money" is the reference to nominal value.
> 2. "Liability" indicates that the member has a duty to pay for his shares.
> 3. Interest shows that the shareholder has rights, for example to attend and vote at meetings.
> 4. "Mutual covenants" stresses the contractual nature of a shareholder rights.

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[67] - Id at p. 397.
[68] - Id at p. 398.
[69] - Id at p. 398.
[70] - [1951] 1 Ch.279.

(ii)Types of Company Shares:-

In Sudan and also in England a company may issue all its shares with same rights , on the other hand a company is free to issue its shares by a way to confer different rights on different classes of shares , such classes may be described as ordinary shares and preference shares .

1. Ordinary shares

Ordinary shares are sometimes described as a residuary class *i.e.* their rights are the rights that remain after the rights of the other classes of shareholders (if any) has been satisfied[71] *i.e.* their rights to dividends and their claim on the company's assets may also be exercised after the claims of the creditors and preference shareholders have been met .Normally the holders of the ordinary shares are the founders of the company and unless the memorandum , articles or the documents describing the shares when they were issued , otherwise provide, ordinary shareholders are entitled to receive dividends when they are declared (they cannot enforce a declaration), and to be paid a proportion of company's assets after payment of the creditors when the company is wound up .The amount will be proportionate to the size of his shareholdings and if the amount to be distributed exceeds the nominal value of the company's shares, each shareholder will participate in this "surplus" in proportion to the nominal value of his shareholdings[72].

An ordinary shareholder will also normally have the right to exercise one vote for each share he holds at the general meetings of the company. These rights of the ordinary shareholders only subsists if there is nothing to the contrary in the documents describing the original issue of the share in the articles or memorandum .The rights otherwise given by law to shareholders are often varied by those documents, for example it is common for a company to have more than one class of ordinary shareholders with different voting rights[73] .

It was stated:

> *"The ordinary shareholders bear all the immediate risks of ownership and possess a full claim on its rewards after prior charges have been met. The burden of company taxation, for example falls ultimately upon earnings available for distribution to ordinary shareholders, since there is no way*

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[71] - L.C.B. Gower, *supra note 1* at. 423

[72] - Janet Dine. *Janet Dine Company Law* at 295 (4th ed.2001).

[73] - Id at. 296.

whereby a company may pass on its charge for profit tax to preference shareholders entitled by contract to a fixed rate of return. If the profits of a company fall, the existence of prior charges means that the level of earning available for distribution to ordinary shareholders will be reduced by an even greater proportion; conversely, a rise in company profits means a proportionately larger increase in these equity earnings"[74].

It seems that the ordinary shareholders are at a serious disadvantageous position as regard with the distribution of the company's profits, nothing could be said except that in law the assets of a company, including its retained profits, belong to the company and not its shareholders as such, so that the extent to which ordinary shareholders are able to enforce their claims will depend on circumstances. The tendency for directors to pursue conservative dividends policies, of course, also limits the risk borne by ordinary shareholders, in that many companies may be in a position, in the event of fall profits, to maintain their existing equity dividend at the expense of a decline in undistributed profits[75].

By the above opinion about the weak position of the ordinary shareholders in relation to the distributed profits of the company, a real question may arise: why do some investors choose to be an ordinary shareholder? In our humble view the reason for this choice is that when profits are high the dividends on ordinary shares rise and may become greater than those paid on preferred shares. Moreover, the market value of the share may increase if the company continues to show profits. That is, the Stock Exchange price for a share of this type of shares may increase, so that the present shareholders could sell their shares at a higher price than they originally paid for them.

2. Preference Shares:

It is well known that in England and Sudan companies may have different classes of shares. Since that it is permitted by law, also companies may issue what is normally called "preference shares" in order to satisfy investors who want a steady return of their capital with a high level of safety. As their name implies they confer on holder's preference over the ordinary shares in respect of their dividend, repayment of capital, or both.

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[74]- H.B. Rose .*Economic Background to investment* at .147.(1st ed. 1960)

[75] - Id at. 148.

The question which may arise is why some companies issue such types of shares despite the fact that such types of shares may cause an unequal treatment between the shareholders of one company, especially in concern of the ordinary shareholders who are, usually, the founders of the company. Many of company law writers tried to justify the issuing of the preference shares, for example Professor Pennington said:

> *" the reason for this is manifold, but the primary amongst them are the following: The original shares of the company, its ordinary shares, may still be held by the persons who started the companies business, and they may be unwilling to issue further ordinary shares to strangers, because ordinary shares usually carry the majority of the voting rights at shareholder' meetings and take the bulk of the profits as dividends, so that if further ordinary shares were issued to strangers, the founders' voting and financial control over the company would be diminished and might be destroyed . In such a case the original ordinary shareholders would insure that the company raised further capital by issuing preference shares"* [76]

Another reason why companies have often two or more classes of shares is that it is easier to induce the outside investors to subscribe to preference rather than ordinary shares. Such an investor usually has little knowledge of the company's business and no wish to participate in its management, and so to him the greater security of preference shares compared with ordinary shares outweigh the financial and voting control which the ordinary share carries[77]. A third reason for issuing preference shares is that at the time when some companies have needed to raise new capital, their existing shares were worth less than their nominal value, and it is practicable to raise new capital by issuing the preference shares with preferential rights to encourage the new investors[78]

The rights of the different classes of the shareholders may be set out in the company's memorandum or articles of association, but usually the articles authorize the directors to issue such type of shares. Also the shareholders of the company in a general meeting may determine these rights. This is the position in the English law, but in some countries which follow the common law, such as the Australian Corporations Act, provides that the rights of preference shares must be set out in the memorandum or

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[76] -R.R Pennington. *Pennington's Company Law* at.177 (3rd ed. 1973).
[77] - Id at. 177.
[78] - Id at. 177.

the articles[79]. Also in the most corporations statutes of the states in the United States of America the articles of incorporation must spell-out the preferences expressly and such preferences generally will not be implied[80]

The holders of preference shares are entitled to have their dividends before those of the ordinary shareholders are paid. The term of issue of these shares or the memorandum of association and articles can determine the rights of the holders but, the court have had to provide a net work of rules which make up possible gaps in the description of the shareholders rights which appear in these documents. Rules are usually expressed in the terms of "presumption" that is, the courts will presume that a particular right does or does not attaches to a share unless it can be shown that this cannot be the case because of the way in which the shares are described in one of the documents mentioned. The alternatives are that the preference shares can be preferred over the ordinary shares in respect of dividends, return of capital or both,[81]so, the preference shares may have a fixed rate of dividends, for example 10% of this dividends must be paid to the preference shares before the ordinary shares receive any thing

Preference shares are cumulative unless the articles or terms of issue state otherwise[82]. This means that if the company cannot pay dividends in one year the arrears must be carried forward to future year and all the out standing preference dividends must be paid before the ordinary shareholders receive any thing[83].If preference shares are not cumulative and the company cannot pay a dividend the arrears are not carried out forward, so the preference shareholders will not receive a dividend for that year.

Preference shares are normally non-participating[84], *i.e.* they are not entitled to share in the surplus profits of the company after payment of specific dividends of the ordinary shares.

In voting unless the articles otherwise provide, preference shares carry the same voting rights. However, it is usual to restrict the preference shareholders right to vote to specified

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[79] - L.C.B. Gower. *Supra note 1* at. 425.

[80] - D.D. Davidson & B. Knowles & L. Forsythe & R.R. Jespersen .*Business Law Principles and cases* at.660. (2nd ed. 1991).

[81] - Janet Dine *Supra note 7* at p. 296w

[82] - Geoffrey Morse. *Charles worth & Morse Company La w* at. 178 (16th ed. 1999) .

[83] -This is the decision in many English cases, for example (Webb v. Earle "1875") L.R. 20 EQ 556, or (Ferguson & Forrester Ltd. v. Taylor "1888") 15R. 711.

[84] - Geoffrey Morse, *supra note 17* at. 179.

circumstances which directly affect them, for example when the rights of preference shareholders are being varied.

In the case of liquidation preference shareholders do not automatically have a right to prior return of their capital. If the articles are silent preference shareholders and ordinary shareholders will be treated equally. But in the most companies the articles will give preference shareholders priority of return of capital

If the dividends have been declared it must be paid. If dividends have not been declared the arrears of dividend may only be paid if there is a provision in the articles[85], this is the decision in the famous English case :(Will v. United Plantation Co. Ltd "1914")[86]. The articles must provide for the payment of the arrears rather than the arrears due, because arrears are not due until declared (the words "arrears due "would therefore exclude un declared arrears). Where arrears of dividends are paid on liquidation they are paid out of the assets remaining after payment of the other debts. It does matter that the dividends are not being paid out of distributable profits[87].

Finally, as between the ordinary shares and preference shares the following points must be noticed that it may be assist the choice of an investor to select the suitable type of shares to invest his money in:

(a) Nominal value: the nominal value of the ordinary shares is generally low so as to enable the middle class man to purchase such shares, while that of the preference shares is normally high.

(b) Capital risk: investors *i.e.* holders who are willing to take capital risk prefer ordinary shares while those who want to receive regular and stable income prefer preference shares .

(c) Where a company declares dividends, ordinary shares can be paid dividends only after the payment of preference shareholders.

(d) In the event of a company being wound up, holders of preference shares have priority over ordinary shareholders in respect of the payment of the capital. Thus we find that after meeting the claims of the creditors of the company, holders of preference shares are paid

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[85] - Id at. 179.
[86] - [1914] A.C. 11.
[87] - Geoffrey Morse, *supra note 17* at. 180.

their shares in capital while holders of ordinary shares stand last in this respect.

(e) Voting rights: so far as voting rights are concerned holders of ordinary shares enjoy wider powers than that of preference shares that the ordinary shareholder can vote on every resolution placed before the company. It should be noted that the preference shareholders are allowed to vote only on such matters as may affect their interest.

(f) Despite the fact that preference shareholders are entitled to priority on some rights *e.g*. (dividends, return of capital after winding up) over the ordinary shareholders, they may be, sometimes, at a disadvantageous position that when the company can borrow money at a rate lower than the preferential dividends, then the company can reduce its capital by kicking out the preference shareholders. In (Wilson's & Clyde Co. v. Scottish Insurance Corp. Ltd."1949") A.C. 462. The colliery assets of a coal mining company had been transferred to the national Coal Board under the Coal Industry Nationalization Act 1946 and the company was to go into voluntary liquidation. Meanwhile the company proposed to reduce its capital by returning their capital to the holders of the preference stock. The articles provided that in the event of a winding up the preference stock ranked before the ordinary stock to the extent of the repayment of the accounts, called up and paid thereon. Held, the proposed reduction was not unfair or inequitable. Even without it, the preference shareholders would not be entitled in a winding up to share in the surplus assets or to receive more than a return of their paid up capital. Accordingly, they could not object to being paid, by means of the reduction, the amount which they would receive in the proposed liquidation.

(iii) Shareholders Rights:-

In the English law and consequently in all countries which follow the common law principles in their Companies Acts such as Sudan, United States of America, Australia and India, rights of the shareholder against the company are considered in relation to the liabilities or obligations of the shareholder to the company,[88] (the

[88] - Peter Willcocks. *Shareholders' Rights & Remedies* at 1. (1st ed. 1991).

two terms, obligations and liabilities, are used interchangeably for the same meaning). What are these liabilities or obligations which are to be satisfied by the shareholder so as to confer him rights against the company? Unless the share holder has fulfilled these liabilities he is not entitled to these rights, but what are these rights he is entitled to? The answers for these questions require a tracking through the Common Law and the Companies Act to show the obligations or liabilities of the shareholder to the company, and then his rights against the company

1. The liabilities of the shareholder:

The liabilities of the shareholder in a company limited by shares are rare and the liability in this type of companies will be extended only to the unpaid nominal value of his shares, also the shareholder is liable to repay the amount of unlawful distribution of dividends to the company [89] .

(a) The liability to pay for the unpaid nominal value of the shares (Table A. reg.12 of the Sudanese Companies Act (SCA) 1925):

The directors of a company may demand that a member pay to the company the amount which is unpaid on his shares on account of the nominal value or by way of premium. If when shares are issued, the full amount of each share is not payable at once, the terms of issue will provide that part is payable on application. However, in rare cases, the company may not require all the nominal amount of a share, or the full amount of a premium on a share, to be paid or at or soon after allotment, but may leave part to be called up in accordance with the provisions of the articles as and when required by the company or, in the event of winding up, by the liquidator[90]. Therefore, a shareholder is bound to pay the whole or part of the balance unpaid on his shares when called on in accordance with the provisions of the articles. Calls must be made in the manner laid down in the articles.

In England a call creates a specially debt due from the shareholder to the company (s. 14"2" English Companies Act (ECA) 1985), and the period within which an action can be brought for payment is 12 years.

[89] - L.C.B. Gower, *supra note 1* at. 101.
[90] - Geoffrey Morse, *supra note 17*. at. 204.

Like Table A reg. 12 in the (SCA) 1925, Table A of the (ECA) 1985 provides for the general rules of the calls on shares by that members must be given at least 14 days notice time and place of payment, and provides also that a person on whom a call is made remains liable even if he subsequently transfers his shares. A call is deemed to be made when the directors' resolution is passed. Directors may differentiate between shareholders as to the amount and time of payment of calls. However, directors must always use their powers in a good faith and for the benefit of the company as a whole that such a power does not entitle directors to make a call on all the shareholders except themselves and this was the decision in the famous English case (Alexander v. Automatic Telephone Co.)[91]It was held to be abuse of power, when directors made calls on shareholders other than themselves.

Like Table A in the (SCA) 1925, Table A of the (ECA) also provides for the late payment and the non payment of shares. In the case of late payment the (ECA) provides for interest to be paid from the day the call was due at a rate fixed by the terms of allotment, or in the notice of the call (since 1983 interest is prohibited in Sudan), but the directors may waive payment of interest wholly or in a part. In the case of non payment it is usual for the articles to give the company a lien on member's shares; in addition the articles may give a company a lien for non payment of a general debt owed to the company. However, by s. 150 of the (ECA) 1985 a lien taken by public company is void unless it is a charge on its own partly unpaid shares for an amount payable in respect of them[92].

Generally we can say that a lien is a form of security which gives the company an important equitable interest in the members' shares. If the money owing to the company is not paid, the company may enforce its security by selling the shares under power given in the articles and the balance of the money received after deducting the amount owing to the company, must be paid to the member.

The important question which may arise is that when a third party advances money on the security of shares, whether the third party has priority over company's lien. In such a case, if the third party gives notice of his security to the company before the company's lien arises, the third party will have priority, but otherwise not[93].

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[91] - [1900] 2 Ch. 56, CA.
[92] - Geoffrey Morse, *supra note 17*. at. 205
[93] - Id at. 206.

In the English case (Bradford Banking Co. v. Briggs & Co.)[94]The articles of the company gave a first and paramount lien and charge on shares for debts due from the shareholder. A shareholder created an equitable mortgage of his shares by depositing the share certificate with a bank as security for an over draft and the bank gave note of the deposit to the company. The shareholder consequently became indebted to the company thereupon a lien arose in favor of the company. Held, the bank had priority as the company's lien arose after notice of their equitable mortgage. The notice was not notice of a trust contrary to what are now s. 360 but notice affecting the company, in its charter of trader, with knowledge of the bank's interest. This decision was also the same to the decision in the other English case (Champagne Perrier-Jouet S.A v. H.H Finch Ltd.).[95]

Where the shareholder is a trustee, the company's lien will prevail over the claims of the beneficial owners unless the company is given notice before the lien arise, that the shareholder is a trustee[96].

A company may forfeit *i.e.* take away a members shares for non payment of a call provided there is authority in the articles, but shares may not be forfeited for any other type of debt owed by the member to the company. The directors may waive payment wholly or in part or they may enforce in full without any allowance for the value of forfeited shares. Forfeiture being, in the nature of penal proceedings, is valid only if the provisions of the articles are strictly allowed and any irregularity will avoid the forfeiture. To protect purchaser of the forfeited shares against possible irregularities in the forfeiture, the articles usually provide that the title of the purchaser shall not be affected by any invalidity in the proceedings in reference to the forfeiture.[97]

By Table A in both the Sudanese and (ECA) the shareholder may make a voluntary surrender of his shares for non payment of calls. This voluntary surrender is only allowed if there is a provision in the articles authorizes the board of directors to accept such surrender. However, a company articles may give power to the directors to accept surrender of shares where they are in a position to forfeit such shares *i.e.* for non payment of calls on those shares[98]. Usually the directors accept the surrender when it is

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[94] - [1886]. 12. App. Cas. 29
[95] - [1882] 1 W.L.R. 1359.
[96] - Geoffrey Morse, *supra note 17* at. 206.
[97] - Id at. 208.
[98] - Id at. 209.

desired to avoid the complicated formalities of forfeiture. A surrender of partly paid shares, not liable for forfeiture, is unlawful because it releases the shareholder from further liability in respect of the shares and it amounts the purchase of the company to its own shares and lastly is a reduction of capital without sanction of the court as in the English case (Bellerby v. Rowland & Mar wood Stemship Co. Ltd.)[99] In this case a company sustained a loss of £ 4000 and the directors agree to share the loss between themselves. They therefore surrendered shares to the amount of £ 4000. The shares were £ 11 each, £ 10 paid, and the intention was that the directors should be released from the remaining £ 1 a share un- paid. The company subsequently became more prosperous and the directors took proceedings to have the surrender declared invalid. It was held, the surrender was invalid as amounting to purchase by the company of its own shares.

(b) The liability of a shareholder to repay unlawful distribution of dividends:

Dividends are payments made out of profits of a company to its members. Dividends paid to preference shareholders will be at a fixed rate, whereas paid to ordinary shareholders will vary with regard to the prosperity of the company. Shareholders do not have an automatic right to dividends even if profits are available. Directors may consider it is more prudent to retain profits within the company. A dividend is therefore not a debt of the company until it is declared. Even then, on liquidation, it is not payable until the outside creditors have been paid

The general rule of dividends is that it cannot be paid if this would result in the company's being unable to pay its debts as they fall due[100], this was the decision in the English case (Peter Buchanan Ltd. v. Mc Vey "1950")[101]. All the rules are subject to this overriding condition of solvency. Clearly if a company did pay dividends in this situation it would have to pay its debts out of capital. In both the Sudanese and (ECA) no company whether public or private, may make a distribution of dividends except out of its accumulated realized profits less its accumulated realized losses. In addition unrealized profits may be used in paying up debentures or amounts unpaid in issued shares. Also s.267 in the (ECA) 1985 provides that a public company may not make a distribution if its net assets are less than the aggregate of its called

[99] - [1902] 2 Ch. 14 CA.
[100] - L.C.B. Gower, *supra note 1* at. 231.
[101] - [1950] reported at [1955] A.C. 516 n., 521- 522.

up capital plus un distributable reserves (un distributable reserves means: the share premium account and the capital redemption reserve, any other reserves which the company is prevented from distributing by law or by its memorandum or articles, and the excess of accumulated un realized profits over accumulated un realized losses).

Whilst the (SCA) 1925 doesn't, s. 270 of the (ECA) 1985, specifies the accounts which must be referred to when determining the legality and amount of any distribution. The relevant accounts are the last annual accounts. Such accounts must have been properly prepared and the auditors must have a report in respect of them[102].

As consequences to the unlawful distribution of dividends, s.277 of the (ECA) 1985 provides that every shareholder who has received an unlawful distribution and who knew or ought to have known that it was paid out of un distributable funds is liable to repay it to the company. Where dividends cannot be recovered from shareholders, every director who was knowingly a part to the unlawful distribution must pay the company the amount lost plus interest, but in this cases a shareholder who has knowingly received a dividends paid out of capital cannot individually, or on behalf of the company, maintain an action against the directors to replace the dividends so paid, at any rate until he has repaid the money he has received[103].

In the (SCA) 1925 the legislature expressly stated for the liability of the shareholder to pay for the un paid nominal value of his shares, but did not clearly state for the liability of the shareholder to repay to the company the unlawful distributions.

About the liability of the shareholder to pay for his unpaid shares, table A (12) of the (SCA) 1925 provides that the board of directors may partially demand a member to pay to the company money which un paid on his shares provided that the amount to be paid shall not exceed one – fourth of the nominal value of his shares each call, and the member shall not be obligated to pay unless one month has elapsed since the last call, and the member who received the call must pay to the company the amount of his un paid shares in the time prescribed in the notice of the call. On receipt of this notice which shall be made fourteen days before prior to the dead line of payment.

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[102] - Geoffrey Morse, *supra note 17* at. 430, 431.
[103] - Id. at. 432.

Like Table A of the (ECA), Table A (17) of the (SCA) 1925 provides that the board of directors may differentiate between the shareholders as to the amount and time of payment of calls. In the case of non payment of a call, the board of directors may, again, at any time require the member to pay by a new notice with the same conditions of the previous notice. In the case of non compliance with the second notice, the board of directors may forfeit a member's shares[104].

By Table A reg. (27) of the (SCA) 1925, the board of directors, if thinks fit, may sale the unpaid shares, but at any time before the sale, the board of directors may repeal the forfeiture of such shares under any conditions imposed by the board of directors on the member. The membership of the member will be ceased in relation to the forfeited shares, but the member will remain liable to pay to the company all amounts due at the time of the forfeiture to the limit of the nominal vale of his shares[105].

About the unlawful distribution of dividends, Table A reg. (97) of the (SCA) 1925 provides that any distribution of dividends, except from the realized profits is prohibited, but the Act did not expressly state for the repayment of this distributions to the company.

(2)Rights of Shareholders:-

In the English law, a member of a company does not in general control the company and its operations. The management and control of the company is vested in its board of directors and the member or shareholder have no direct say in the management and the control of the company unless they also happen to be on the board of directors. In this event their power to exercise control over the operations of the company, will be in their capacity as directors not in their capacity as members. So because of this lack position, some rights must be conferred by the law on the members, to some extent, to enable them to share the control of the company and its operations. These rights are usually known as: the right to attend the company meetings, and the voting rights.

Since that the most important object of the vast majority of companies is economical, the concept of the word "right" may be restricted in the dividends rights which are distributed by the company yearly.

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[104] - Table A. reg. (24), (25) of the Sudanese Company Act 1925.
[105] - Table A. reg. (28), of the Sudanese Company Act 1925.

Even in minds of some lawyers the concept of the word "right" may not exceed the three known rights, (attendance and voting in the company meetings, dividend right and the right to return of capital after winding up the company).

In our humble view, the concept of the rights of the member or a shareholder should be regarded more widely to include, in addition to the mentioned rights, other types of rights, these rights, despite the fact they are not directly connected with the well-known mentioned rights, are very important in many other directions. As an example for these rights, is that in the English law the share holder has a right to prevent the company from acting ultra vires, since that the company powers are set out in the "object clause" of its memorandum of association. The essential function of the object clause is to protect the shareholders who invested their money on the understanding that the company would only do the things specified. Any shareholder can seek a court injunction to proposed ultra vires or unauthorized transaction, but this cannot avoid a contract already made. Moreover, the proposed contract can be ratified by a special resolution (s.r) of shareholders. So it is a very important to grant to the shareholder the right to prevent the ultra vires act before it takes place. Another example arise in that the member or the shareholder when subscribing or buying a share of a company is assumed to know well his obligations or duties to the company, so the shareholder should not have his obligations to the company increased without his consent, a thing which represents an important right to protect the shareholder. A third example arise in that the shareholder must have a right to have a share certificate issued to him or to receive a copy of the balance sheet and the statutory report , or the right of a member to have the register of members rectified, and the like. We mean by the last example that some documents should be granted to the shareholder.

Despite the fact that these types of rights are widely scattered through the Common Law and the Companies Act, they do not often meet the same importance of the meeting, voting, dividend and return of capital rights

In general, shareholder's rights are not exclusively counted in the majority of the most important English references, but Peter Willcocks counted them in his modern book (Shareholder's Rights & Remedies)[106]as follow :-

[106] - Peter Willcocks, *supra note 88* at 92, 93.

(a) The right of the share holder to restrain the company from acting ultra vires.
(b) The right to prevent an irregular forfeiture of shares.
(c) The right to impugn a resolution of a general meeting if the notice convening the meeting was not sufficiently informative.
(d) The right to have a reasonable opportunity to express views.
(e) The right to have amendments to resolution proposed at meetings.
(f) The right of a member to transfer his shares.
(g) The right of a member not to have his obligations to the company increased without his consent.
(h) The right to relief when the company majority did not act bona fide for the benefit of the company as a whole.
(i) The right to vote (if voting shares).
(j) The right to exercise powers conferred by the articles to appoint directors
(k) The dividend rights.
(l) The right to set a side an allotment of shares made for improper purpose.
(m) The right to inspect documents and register kept by a company.
(n) The right to have a share certificate issued to him.
(o) The right to appoint a proxy.
(p) The right to demand a poll.
(q) The right to attend company's meetings.
(r) The right to have a register of members rectified.
(s) The right to a copy of the sheet balance and statutory report.

In our humble view this long list of shareholder's rights can be summarized to be as follow:-

(a)The right to prevent the ultra vires act.
(b) The right of a member to prevent an irregular forfeiture of shares.
(c) The right of a member to attend company meetings and the relevant rights.
(d)The right of a member to transfer his shares
(e)The right of a member not to have his obligations to the company increased without his consent.
(f) The right to relief where the majority did not act bona fide to the benefit of the company as a whole.
(g)Voting right and the relevant rights

(h) The right to some formalities (share certificate, register of members and the statutory report).

(In the next part of this chapter we will explain all these rights under the light of the two types of shares, preference and ordinary).

(iv) The Presumption of Equality Between Shareholders:-

In the English law companies limited by shares must issue shares and these shares must, as we have previously mentioned, confer some rights on its shareholders. The question which may arise here: are these rights inevitably equal between the shareholders? Simply the answer for this question is that the type of the share whether ordinary or preference determines the rights of its holder. Since that there are many types of shares in one company, the rights of the members of this company are not equal. It is very important to say that in the absence of evidence to the contrary, equality is assumed between shareholders. Professor Gower said

> *"The typical company – one limited by shares must issue some shares, and the initial presumption of law is that all shares confer equal rights and impose equal liabilities. As in partnership equality is assumed in the absence of evidence to the contrary. Normally the shareholder's rights will fall under three heads (i) dividends, (ii) return of capital in a winding up (or authorized reduction of capital), and (iii) attendance of meetings and voting, and unless there is some indication to the contrary all the shares will confer the like rights to all three "*[107].

Also Professor Gower said:

> *"There is similar presumption of equality so far as concern the share holder's liabilities. As we have seen, in the company limited by shares the only liability qua shareholders will be to pay the nominal amount of shares, so that if shares are of the same nominal value the holder's liabilities are necessarily the same. And in call up the unpaid liability, this equality must be preserved "*[108].

The expression "evidence to the contrary" clearly means that if the memorandum or the articles of association authorize the directors to issue preference shares, in this event no way to speak

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[107] - L.C.B. Gower, *supra note 1* at. 403

[108] - Id at. 403.

about equal treatment between shareholders of the company, so it is to be noticed that the equality between shareholders is a conditioned equality that this presumed equality takes place only in the absence of a provision authorizing directors to issue preference shares with preferred treatment.

In Part (3) of this chapter we said that Peter Willcocks in his book "Shareholder's Rights & Remedies" exclusively counted shareholder's rights. Despite the fact that the preference share confer on its holder a preferred treatment with regard to the ordinary share we find that many of these rights cannot be differentiated *i.e.* it should be equal regardless of the type of the share (whether preference or ordinary), while the other rights can be differentiated. So, according to our humble view the shareholder's rights, with regard to the presumption of the equality between the shareholders, can be classified to two categories of rights: (i) The inherent equal rights, (ii) The conditioned equal rights. On other words the first category confers similar rights on all the members of the company regardless of the type of their shares, and in the other category the equality depends on the type of their shares.

In this part of the chapter we will explain the shareholder's rights under the two mentioned titles.

1. The Conditioned Equal Rights:-

(a) The right to attend the meetings of the company and the relevant rights

Much of the constitutional work of companies is done through meetings of members. In both Sudanese and English laws there are two types of meeting (in addition to the statutory meeting which must be held only by a public company and once through the life time of the company): An annual general meeting (a.g.m) and the extra ordinary meeting (e.g.m).

The first general meeting must be held within 18 months of incorporation, and then after at least once in every calendar year, with not than 15 months between any two meetings.[109]If meeting is not held in accordance with these rules, s.69 of the (SCA) 1925 and s. 366 (4) of the (ECA) 1985 provide that the company and any officer of it who is in default is liable to fine. Both Sudanese and English Acts does not specify in any details as to the business to be transacted by the (a.g.m.), but the ordinary

[109] - S. 366 of the (ECA). 1985.

business of the (a.g.m.) is the approval of the annual accounts, the reading of the auditors report and the appointment of auditors to the future, the directors report and which will include the director's recommendations of the dividend to be paid to shareholders (a resolution will be proposed that the amount recommended be paid by the way of dividend), appointment of directors where some are retiring, a resolution to pay the auditors and a resolution to pay the directors[110].

The (e.g.m.) is any general meeting other the (a.g.m.). S.71 of the (SCA) 1925 and Article 37 of the (ECA) 1985 provide that the directors may convene a meeting of members. They will do so if special business of importance requires a meeting of members. S. 71 "1" of the (SCA) 1925 and s. 368 of the (ECA) 1985 give the holders of one-tenth of the voting power at a general meeting, the power to require the directors to convene such a meeting within 21 days. Also by s. 370 two members or more holding at least one-tenth of the issued capital, (whether paid or unpaid) can themselves call a meeting.

In England by s. 371of the (ECA) 1985 the court can order that (e.g.m.) be held if it is otherwise impracticable to call or conduct one properly. Any director or member can apply, or the court can take the initiative itself, as in the famous English case (Re El Somboro- 1958)[111]. In this case the applicant held 90% of the shares in a private company, but was not a director. The rest of the shares were divided equally between two persons who were directors. The company's articles state that the quorum for meeting was two persons. Wishing to remove the directors the applicant convened a meeting under s. 132 of the (ECA) 1948 (now s. 368). However since the directors did not attend no quorum was present. An application was then made to the court under s. 135 Companies Act 1948 (now s.371). The court held that one member could constitute a quorum. The applicant could therefore remove the directors. And Wynn- Parry J. said in this case:

> *"the court must examine the circumstances of the particular case and answer the question whether as the practical matter, the desired meeting of the company can be conducted, there being no doubt of course, that it can be convened and held"*[112].

However, the Court of Appeal held that it would be wrong to use the power in s. 371 to call a meeting and determine its quorum if the effect of that would be to override class rights which were

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[110] - Janet Dine, *supra note 7*, at. 158, 159.
[111] - [1958] Ch 900
[112] - Janet Dine, *supra note 7* at. 159

embedded in a shareholder agreement. In (Harman and Another v. BML Group ltd)[113] the capital of the company was divided into A and B shares, the B shares being registered in the name of B. H and M held the majority of the A shares. Under agreement signed by all the shareholders it was provided a meeting of shareholders would not be valid unless a B or proxy was present. H and M applied for an order under s. 371 Companies Act 1985 that a meeting of the company be summoned, ruling that any two members of the company would constitute a quorum. The court of appeal held that this was not a proper use.

Irrespective of the type of business there are three types of resolutions at company meeting. Firstly, the ordinary resolution (o.r) which is not defined in the (SCA) 1925 and the (ECA) 1985[114] can be passed by a simple majority of those voting. Table A of the (SCA) and the (ECA), if applies, gives a casting vote to the chairman. It should be emphasized that the rule is one vote per share, not per person. Someone holding the most of the voting shares can therefore dictate what will be passed (but if voting is by show of hands then the rule is one vote for one person). Sometimes the articles or the term of issue can give weighting voting rights as in (Bushell v. Faith)[115], in this case a director held one-third of the ordinary shares. The articles however, provided that on any resolution to remove that director, his shares should then carry three vote each. This was held valid. Secondly, s.74 "1" of the (SCA) 1925 and s. 378 of the (ECA) 1985 define an extra ordinary resolution (e.o.r.) as a resolution passed by at least a three-fourth majority of the votes of the members entitled to vote, in person or, where allowed by proxy, at a general meeting of which notice specifying the intention to propose the resolution as (e.o.r.) has been duly given. From this definition we can imply that this resolution must be passed by a three-quarters majority of votes cast. Notice of intention to move such a resolution must be given to the members when the meeting is called. It is very important to be noticed here that the three quarter majority required for this type of resolutions is taken from the attended members not all the registered members, and this is the decision of the Court of Appeal in the Sudanese case (Rainbow Limited Company v. Mustafa Abdelhameed Abu Elizz.1984)[116]. This type of resolutions is normally needed for decisions connecting with the

[113] - [1994] 2 BCLC 674.
[114] - Geoffrey Morse, *supra note 17* at 228.
[115] - [1970] A.C. 1099.
[116] - [1984] Sudan S.L.J.R, 188.

voluntary winding up, and the articles may require elsewhere. Thirdly, by s. 74 "2" of the (SCA) 1925 and s.378 "2" of the (ECA) 1985, a resolution is (s.r.) if passed by at least three fourth majority votes of members entitled to vote, in person or, if allowed by a proxy, at a general meeting of which notice specifying the intention to propose the resolution as (s.r.) has been duly given. There must be another meeting within not more than 30 days and not less than 14 days to confirm the resolution (it is to be noticed that the confirmation can be passed only by the simple majority and the majority of three quarters is not required).

It is well known that a member of a company has the right to attend company's meetings. This is a common concept; the question which may arise is whether all classes of shareholders have the right to attend all the types of meetings regardless of whether the meeting is assigned for specific class of shareholders. Lord Russell of Kill Owen answered this question in the English case (Carruth v.ICI – 1937)[117],

> *"Prima facie a separate meeting of a class should be a meeting attended only by members of the class, in order that the discussion of the matters which the meeting has to consider may be carried on unhampered by the presence of others who are not interested to view those matters from the same angle as that of the class and if the presence of outsiders was restrained in spite of the ascertained wish of the constituents of the meeting for their exclusion , it would not, I think, be possible to say that a separate meeting of the class had been duly held" .*

As we have previously mentioned, the right to attend the company's meetings is a conditioned equal right and the law left to the company's memorandum and articles to determine a class of persons who are entitled to attend a certain meeting. It is clearly that the decision in the above case deals with a preferred classes of shares. Unless the articles otherwise provides, preference shares carry the same rights. However it is usual to restrict the preference shareholders rights to vote to specified circumstances which directly affected them, for example when the rights of preference shareholders are being varied, so consequently they are usually not allowed to attend meetings specifically affect the rights of the ordinary shareholders[118]. However, the conditioned equality in the right of attending company's meetings will be clearly

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[117] - [1937] A.C. 707.

[118] - R.R Pennington, *supra note 11* at 538.

appeared in the following rights which are relevant to the right of the member to attend company's meetings.

The first relevant right is the right of a member to impugn a resolution of a general meeting if the notice convening the meeting was not sufficiently informative[119]. This right was early followed in the English law by the decision in (Kaye v. Gordon Tramways Co."1888")[120].The member has a right to receive a notice and a meeting cannot be held unless a proper notice of it has been given. The length of the notice depend on the type of the meeting. In the (a.g.m) , for example in the English law it must not be less than 21 days, and in the extra ordinary meeting (e.g.m) it is 14 written notice unless (s.r.) is to be moved in which case 21 days notice is required. The notice must specify the date, place and the time of the meeting. It is not necessary to give detail of ordinary business, but the nature of any other business must be specified. However, where special or (e.o.r) is to be moved the notice must set out the full text of the resolution and any amendment proposed at the meeting will be ineffective unless all the members (not merely those present) agree waive their right to notice, this was the decision in (Re Moorgate Mercantile Holding)[121]. Also if the directors have interest in the passing of a resolution, it must be fully disclosed in the notice calling the meeting, so if their interests in the meeting are not disclosed and the resolution is passed, it is void. If the notice of the meeting satisfied the mentioned conditions, then it will be considered as a sufficiently informative notice, and if no, the member has a right to impugn a resolution of a general meeting that the notice convening the resolution was not sufficiently informative.

This right depends on whether the member has the right to vote in the meeting and professor Pennington said:

> *"Members who have no voting rights need not be summoned to the meeting and have no right to attend it.[122]"*

The second relevant right is the member's right to have a reasonable opportunity to express views. This right connected with the conduct of meeting and specifically it is a responsibility of the chairman of the meeting (the chairman may be the chairman of the board of directors, any director or any member).The chairman according to Table A of the (SCA) 1925 and the (ECA) 1985 must act in good faith in the interest of the company as a whole, ensure

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[119] - Peter Willcocks, *supra note 23* at. 91.
[120] - [1898] 1 Ch 358.
[121] - [1980] Re 1. W.L.R 227
[122] - R. R. Pennington, *supra note 11* at 583.

that business is conducted in an orderly manner in the order set out in the agenda, allow all points of views to be adequately expressed and then put the motion to be voted. Chairman's responsibilities are many but here we will be concerned with his responsibility to allow members to express views, for example: "a meeting may resolve to close discussion on a resolution and to take a vote on it for with, but the closure may not be moved until members have had a reasonable opportunity to discuss the substantive resolution, and if the closure is applied in order to stifle discussion, the vote take on the substantive resolution is void. Members may also resolve to dissolve the meeting or to adjourn it until a later day unless the chairman is given power to dissolve or adjourn by the articles and he refuse to consent to a dissolution or adjournment"[123].

This relevant right is a conditioned right because of the same reason of the first relevant right. Since that member who have no voting right according to the articles need not be summoned and have no right to attend such meeting and consequently no way for him to express his views.

The right of a member to express his views was early adopted in the English law by the decision in (Wall v. London and Northern Assts Corporation "1898")[124].

The third relevant right to the right of a member to attend company's meeting is the right of a member to move amendments to resolution proposed at meeting .When a resolution has been moved any member may speak on it or move amendments. There is no need to give notice of proposed amendment to the company, unless it is substantially alters the nature or effect of the resolution.[125]So if a positive amendment, pertinent to the subject matter of the resolution, is proposed it must be voted upon it first. If the chairman refused to put a proper amendment to the meeting the resolution if passed, is not binding. Also amendment cannot be moved if it goes beyond the notice convening the meeting. This simply, means if the resolution to be passed is (s.r.), it should be verbatim[126]in the notice convening the meeting and the only method of voting is yes, or no. Other types of resolutions are not required to be set out verbatim in the notice of the meeting so a member may move amendment. But even in (s.r.) and in certain

[123] - Id. at. 550.
[124] - [1898] 2 Ch 469.
[125] - R.R Pennington, *supra note 11* at 549.
[126] - Id at 549.

cases a member may move amendments without harm, professor Geoffrey Morse said about these exceptions:

> *"Because notice of a special business must state the resolution to be passed in such a way as fairly to state the purpose for which the meeting is convened, there is little scope for amendment where a resolution is special business. Where a notice of meeting stated that to pass, with such amendments as should be determined, a resolution that three named persons be appointed directors, an amendment to elect two other directors as well is held valid. Again, there is little scope for amendment for special, extra ordinary and elective resolution since the notice of such resolution must set out in substance the exact wording of the resolution. However, where a notice of a meeting stated that it was to be passed (s.r.) to wind up voluntary and to appoint X as a liquidator, and the second resolution was dropped and a new one to appoint Y as a liquidator was passed, it was held that Y's appointment is valid because as soon as the resolution to wind up was passed a liquidator could be appointed, without notice, under the Act*"[127].

The right of a shareholder to move amendments to resolutions proposed at meetings was early agreed by the decision in the English case: (Henderson v. Bank of Australia "1890")[128], the decision in this case was "if the chairman improperly refuse to allow an amendment to any resolution to be discussed and voted upon, and the resolution is put to vote and carried, the resolution is void".

Again, it is to be mentioned that this relevant right (to the right of a member to attend company's meetings) is a conditioned right. It depends on whether the member has the right to attend the certain meeting or not.

The fourth relevant right is the right of the shareholder to appoint a proxy. The term proxy is used both to refer to the person appointed to act on behalf of the member and the instrument which gives him the required authority. Although there is no common law right to vote by proxy, s. 372 of the (ECA) 1985 gives such a right. By s.372 every member has the right to appoint a proxy to attend and vote for him. The proxy does not need to be a member. A proxy may be deposited with the company at any time up to 48 hours before the meeting. The articles may specify a shorter but

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[127] - Geoffrey Morse, *supra note 17* at. 231.
[128] - [1890] 45 Ch. D. 330.

longer period. When a company invites proxies by issuing proxy cards it must issue them to all members, not merely to those from whom the directors expect support. A proxy may be general *i.e.* given a discretionary power to vote, or special, *i.e.* required to vote at a particular resolution as instructed. The instrument appointing a proxy must be in writing under the hand of the appointer, or if the appointer is a corporation, either under seal or the hand of a duly authorized officer. The articles usually provide for the form and proof of proxies. It is the duty of a chairman to decide in the validity of proxies. But where proxy forms sent out to all shareholders in the company and the chairman was named as their proxy, it was held that he was bound to demand a poll in order to ascertain the sense of the meeting, and bound to exercise all the proxies in accordance with the instructions which they contained[129].

The right of a shareholder to appoint a proxy is a conditioned one, it depends on whether the appointer has the right to attend such meeting that" members who have no voting rights need not be summoned to the meeting and have no right to attend it"[130], and consequently , have no right to appoint a proxy to attend such meeting.

(b) Voting right and the relevant rights:-

Voting right is the powerful weapon of the shareholders which enables them to take the control of the company. The Jenkins Committee said that:

> *"The companies act gave shareholders powerful weapon provided they choose to use them, and even if practical considerations make them difficult for the small investors to wield the same cannot be said of the large institutional investors"[131].*

It is clear that voting right is a one of the most important rights of the shareholder. The voting right of the shareholder will normally be set out in the articles. The usual practice is to vote by show of hands, *i.e.* each member present has one vote regardless of the number of the shares held. However, if a poll is properly demand, then a members' vote will depend on the number of the voting shares he holds. The circumstances in which a poll may be demanded may appear in the articles. However, the (ECA) 1985 provides a minimum standard for the articles[132], s.373 reads:

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[129] -Geoffrey Morse, *supra note 17* at 227.
[130] - R.R Pennington, *supra note 11* at 538.
[131] - Jenkins Committee Report - Report of The Company Law Committee 1962 (Para. 468.
[132] - Janet Dine, *supra note 7* at 163.

"(1) A provision contained in a company's articles is void in so far as it would have the effect of their:

(i) Of excluding the right to demand a poll at a general meeting on any question than the election of the chairman of the meeting or the adjournment of the meeting.

(ii) Of making ineffective a demand for a poll on any such question which is made either:

(a) By not less than 5 members having the right to vote at the meeting or:

(b) By a member or members representing not less than one-tenth of the total voting rights of all the members having the right to vote at the meeting or:

(c)By a member or members holding shares in the company conferring a right to vote at the meeting, being shares on which an aggregate sum has been paid up equal to not less than one-tenth of the total sum paid up on all the shares conferring that right.

(2) The instrument appointing a proxy to vote at a meeting of a company shall be deemed also to confer authority to demand or join in demanding a poll , and for the purpose of sub section (a) a demand by a person as proxy for a member is the same a demand by a member."

Table A reg 63 of the (SCA) 1925 and Table A of the (ECA) 1985 provides that no member shall vote at any general meeting or at any separate meeting of any class of shares in the company either in person or by a proxy unless all moneys presently payable by him in respect of that share have been paid[133]. Table A also provides that no objection shall be raised to the qualification of any voter except at the meeting or adjourned meeting at which the vote objected is tendered, and every vote not disallowed at the meeting should be valid. Any objection made in due time shall be referred to the chairman whose decision shall be final and conclusive[134]. In: (Max v. Estate & General Investments Ltd.)[135]Brightman J. said that

"There is much to be said for an article like regulation 58. In that case a proxy form, which was liable to stamp duty because it authorized a proxy to vote at more than one meeting but which was un stamped, was not void but a valid authority capable of being stamped, and since a company had accepted it without objection at the meeting at the votes cast

[133] - Reg. 57 of Table A of the (ECA) 1985.
[134] - Reg. 58 of Table A of the (ECA) 1985.
[135] - [1976] 1. W.L.R. 380.

by the proxy were valid. Further by virtue of regulation 58 the objection taken several days after the meeting was made was too late".

The right of a shareholder to vote is a conditioned equal right between the shareholders and not inherent equal right that a company may issue two types of shares, ordinary shares and preference shares. The articles or the terms of issue normally restrict the preference shareholders' rights to vote to specified circumstances which directly affect them, for example when the rights of preference shareholders are being varied, but unless the articles or terms of issue otherwise provide preference shares carry the same voting rights as the ordinary shares. Also the memorandum or articles may provide for a complicated structure of voting rights, for example in recent years some companies have issued non voting ordinary shares. The purpose of such issues is to enable the companies concerned to raise money and at the same time enable those with the majority of existing voting shares to retain control[136]. The idea of non voting shares has been attacked from time to time. An example for the opinions against the idea of non voting shares is to be found in a note of Dissent to the "Jenkins Committee report"[137]. The note of dissent was singed by Mr. L. Brown, Sir George Eriskine and Professor L.C.B. Gower:

"Feeling as we do, that the development of non voting equity shares is undesirable both in principle and practice, we find our selves unable to concur in the failure to stronger recommendations for their control.

2- In our opinion the growth of non voting and restricted voting shares (a) strikes at the basic principle in which our Company Law is based (b) is inconsistent with the principles underlying our Report and Reports of earlier Company Law Committees (c) is un desirable.

3- The businesses corporation is a device for enabling an expert body of directors to manage other people's property for them. Since these managers are looking after other's people's money it is thought that they should not be totally from any control of supervision and the obvious persons to exercise some control are the persons whose property is being managed. Hence the basic principle adopted by British Company Law (and, indeed, the laws of most countries) is that ultimate control over the directors should be exercised by the

[136] - Geoffrey Morse, *supra note 17* at 184.
[137] - Jenkins Committee Report, *supra note 70*.

shareholders. This control cannot be exercised in detailed and from the day to day, but the shareholders retain the ultimate sanction in that it is they who "hire and fire" the directorate.

When the directors own the majority of the equity they are free from out side control, but here they are managing their own money, Hence the interests of the directors and the shareholders are unlikely to conflict, and self interest should be a sufficient curb and spur (subject to certain legal rules to protect the minority against oppression). When, however, the directors have no financial stake in the prosperity of the company, or only a minority interest, the out side control operates. (Paragraph 4 and 5 showed that the trust of must Company Law Reports was increase effective shareholder control)

6- In recent years, however control by shareholders has been stultified in two ways ; firstly in a few cases by cross-holding and circular holding within a group of companies and secondly by non voting equity shares. The first method has already received the attention of the legislature and an attempt has been made to control it by section (23 of the Companies Act 1985). In our discussion of this section … we recognize that it is improper for directors to maintain themselves indefinitely in office, again the wishes of the other shareholders. We also recognize that section (23 Companies Act 1985) does not go far enough in preventing this mischief and we reject an extension of the section with reluctance and only because of the complexity and arbitrary nature of the provisions which would be necessary … The second method of maintaining control by the existing directors, by utilizing non voting shares, is not as yet controlled in any way, it is only of recent years that it has become major issue. Today non voting shares are the simplest and most straightforward method whereby directors can render themselves irremovable without their consent, notwithstanding that they only own or control a fraction of the equity.

7- It is said that the shareholder control is ineffective because of the indifference of shareholders. Everyone would probably agree that a shareholder is apathetic while all goes well. But while all goes well, there is no reason why they should not be apathetic; their intervention is only required when things go ill. No doubt it is true that the small individual shareholders has little power even then, but, as we point out…the institutional investor has considerable influence; and even non-institutional

shareholder are collectively powerful as long as they have votes. It can be hardly doubted that the possibility that a take-over bidder will obtain control by acquiring those votes has caused directors to pay greater heed to the interests of shareholders.

8- It is also said that the shareholder control is ineffective, since directors as a class, know better what is good for business and for shareholders than the shareholders themselves. In the normal case this is usually true. But if shareholders control is destroyed and nothing put in its place we have to go still further and say that business inefficiency is best ensured by allowing the directors to function free from any out side control, except that of the courts in the event of fraud or misfeasance, and by making themselves irremovable, without their own consent, however inefficient they may prove to be."[138].

Despite these criticisms mentioned in the above report nothing has been made in the English law about the non voting shares.

The important question which may arise is what the limitation of the voting power is. Is it an absolute power? It is well known that there is a general rule that members must exercise their power of voting bona fide for the benefit of the company as a whole.[139]It was held that

"The shareholders are not trustees for another, and unlike directors, they occupy no fiduciary duties. They vote in respect of their shares, which are property, and the right to vote is attached to the share itself as an incident of property to be enjoyed and exercised for the owner's personal advantages"[140].

Further, it was held that a member is not precluded from voting or using his voting power to carry a resolution merely because he is interested in the subject matter of the vote.[141]

"However, a member does not have a complete and unfettered power to as he sees fit for he has a duty not to affect a fraud on the minority"[142].Professor Ford categorize this principle as

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[138] - The sections of the (ECA) mentioned in this report have been updated by Professor Janet Dine to cope with the 1985 Companies Act (*supra note 7* at 185, 186.)

[139] - L.C.B. Gower, *supra note 1* at. 614.

[140] - Peters' American Delicancy Co Ltd. v. Heath [1939] C.L.R. 457 at 504.

[141] - Burland v. Earle [1902] A C 83 at 94.

[142] - Ford, *Principles of Company Law* at 540 (5th ed. 1986).

falling within the doctrine of "fraud on a power". The doctrine of fraud on the minority has been stated by Professor Ford as follows:

> *"The essential notion is action beyond the scope of the power. The terms of the power imply an obligation not to use it for an ulterior purpose[143]".*

Peter Willcocks said:

> *"It appears to be generally accepted that it is neither possible nor wise to attempt to delineate the boundaries of the principles that a person, in exercising his voting rights, must do so in a manner which does not constitute a fraud on the voting power. However, there are certain areas where this doctrine has been considered and applied in detail, the alteration of articles of association and the disposal of corporate property"[144].*

Firstly, about the alteration of the articles of association it must be noticed that it is not possible, by the article of association to make an unalterable article and there is a very important condition which should be satisfied that the alteration of the articles must be bona fide for the benefit of the company as a whole not merely the benefit of the majority of the shareholders , this is the decision in the English case (Peters' American Delicacy Co. Ltd.v. Heath)[145]in this case Latham CJ laid down the following rules :

> *"1- A company cannot deprive itself of the statutory power to amend the articles, either by agreement or by a provision contained in the articles.*
>
> *2- It follows that that the contract between members of the company and between the company and its members which is constituted by the articles must be regarded as containing among its terms a provision that articles may be altered in a manner provided by the Act, that is, by (s.r.).*
>
> *3- It follows that where the right of a member of a company depends only upon the articles it is possible to alter the rights of members or of some only of the members by altering the articles. The fact that an alteration prejudices or diminishes some of the rights of the shareholders is not itself a ground for attacking the validity of an alteration.*
>
> *4- The power to alter articles must be exercised bona fide*
>
> *5- It is for the shareholder to determine whether an alteration of the articles is or is not for the benefit of the company,*

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[143] - Id at 540.
[144] - Peter Willcocks, *supra note 23* at 111.
[145] - [1939] C.L. R. 457.

subject to the provision that the decision is not such that no reasonable man could have reached it.

6- An alteration which is made bona fide and for the benefit of the company, if otherwise within the power, will be good, but is not the case that is necessary that shareholder should always have only the benefit of the company in view. In case where the question which arises is simply a question as to the relative rights of different classes of shareholders the problem cannot be resolved by regarding merely the benefit of the corporation.

7- When the validity of a resolution is challenged, the onus of showing that the power has not been properly exercised is on the party complaining. The court will not presume fraud or oppression or other abuse of power.

Latham CJ. then summarized the foregoing as follow:

"The result of applying these principles is that the special resolution altering the articles cannot be declared to be invalid merely upon the ground that the original articles conferred special rights upon the holders of partly paid shares of which the alteration deprived them, or upon the ground that the voting holders of fully paid shares were interested in making the alteration adversely to the holders of partly paid shares. If, however, the resolution was passed fraudulently or oppressively or was so extravagant that no reasonable person could believe that it was for the benefit of the company it should be held invalid"[146].

*Secondly***,** about the disposal of corporate property, it has been held that the majority may not dispose of the company's assets to their benefit essentially to the exclusion of that of the majority, this was the decision in the old English case (Burland v. Earle " 1902")[147].But the decision in the English case (Ngurli Ltd. v. Mc Can "1958") frankly appeared the prohibition of such practice, it is stated:

"There are two lines of cases in which it has been held that the courts will interfere to prevent the abuse of powers by articles of association. One instance is where it is necessary to prevent an abuse by the majority of powers conferred upon a company in general meeting. The other instance is where it is necessary to prevent an abuse by the directors of the powers conferred on them in by the articles. The court is more ready

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[146] - Peter Willcoks, *supra note 23* at 114.

[147] - [1902] AC 83 at 93.

to interfere in the second than it is in the first instance. Shareholders even where they also directors are not trustees of their votes and as individuals in general meeting can usually exercise their votes for their own benefit. But there is a limit even in general meetings to the extent to which the majority may exercise their votes for their own benefit. That limit is expressed in the classic passage from the judgment of Lindley MR in Allen v. Goldreef of West Africa The power of a three fourth majority to alter articles of association must, Lord Lindley said "like all other powers exercised subject to those general principles of law and equity which are applicable to all powers conferred on majority and enable them to bind minorities. It must be exercised , not only in the manner required by law, but also bona fide for the benefit of the company as a whole, and must not be exceeded" The extent of such a majority to alter the articles in fully discussed in this court in Peters' American Delicacy Co. Ltd. v. Heath. Nor can the majority of shareholders exercise their voting powers in general meeting so as to commit a fraud on the minority. They must not exercise their votes so as to appropriate to themselves or some of themselves property, advantages or right which belongs to the company".[148]

(c)The Shareholders' Right to Dividends:-

"Dividends are a portion of the amount of the profits of the company and are distributed amongst the members in proportion to their shares"[149]. Dividends must be distinguished from interest. Interests are paid to debenture holder. It is a debt and must be paid out of capital if no profits are available.

By Table A reg. (97) of the (SCA) 1925 and s. 263 of the (ECA) 1985, dividends must only be paid out of the profits available for the purpose. Anything else would be unlawful reduction in capital. Profits available are the company's accumulated realized profits. The existence of available profits must be shown by the relevant accounts (normally the latest audited annual accounts). Profits in earlier year can be accumulated for future years.

The realized profits are: trading profits plus realized capital profits from actual disposal of fixed assets. Unrealized capital appreciation, such as an assumed increase in the value of the

[148] - [1958] 90 CLR 425 at 438.

[149] - B. K. Acharya & P. B. Govekar, *Company Law and Secretarial Practice at 273*. (2nd ed. 1984).

company's land, cannot be included; nor can be capitalized profits which have already been used to redeem or buy the company's own shares or to issue bonus shares.

The procedure for declaring and paying dividends is governed, normally, by the articles. Where Table A of the (SCA) 1925 and the (ECA) 1985 apply the initial decision is made by the directors, who may (if profits are sufficient) recommend a dividend. This recommendation is then put to members, who can vote themselves a dividend by (o.r) in a general meeting. The amount voted upon may be up to, but not exceeding, the amount recommended by directors.

The members may declare more than one dividend in a year. Table A of the (ECA) 1985 allows directors to recommend "interim" dividends in addition to the annual "final dividends". Payment will take place on the date or dates resolved by the members. Dividends must be paid in money unless the articles provide otherwise. Table A also allows members to resolve that they be given the option to take shares in the company instead of money.

Table A in both the (SCA) 1925 and in the (ECA) 1985 can be altered in various ways, for example articles may provide that all decisions about dividends be left to the directors, without the need for members' resolution.

Whilst there is no specific section in the (SCA) 1925, s. 277 of the (ECA) 1985 covers dividends paid unlawfully. Where a distribution, or part of one, is made unlawfully and, at the time of distribution the member knows or has reasonable grounds to believe that it is made wrongfully, he is liable to repay the whole or the unlawful part to the company. If the distribution was not made in cash, he must pay the cash value of the unlawful part. The directors who recommended an unlawful dividend may also be liable to the company.

The right to dividend is a one of the fundamental rights of a shareholder and may be the main purpose for forming a company. This right is a conditioned equal right in that in the case of absence of a provision to the contrary no differentiation between the shares in respect of dividends and every share is entitled to the same part of dividends. But as we have previously mentioned that the articles may authorize the company to issue what called a "preference shares", then the distribution of dividends will be unequal distribution between the shareholders, and any preference shareholder must be normally paid the preferential amount in full before money becomes available to ordinary dividends (dividends of ordinary shares). Preference shares are entitled to a fixed rate

of dividends and may be "participating" *i.e.* in addition to preferential dividend, holders are also entitled to ordinary dividend declared. Preference shares are presumed to be none participating unless the articles provide otherwise. Preference shares may be "cumulative" that is to say their part in the profit will automatically be carried forward (if not paid in the current year), so that in the future all arrears are to be paid before any one else gets a dividend. Unless otherwise provided in the articles, preference shares are presumed cumulative.

(d) The right of the shareholder to return of capital on a winding up:

"Liquidation or winding up is the process by which the company life brought to an end and its property administered for the benefit of its members and creditors."[150]

The right of a shareholder to return of capital on winding up of the company is a conditioned equal right between the different types of shareholders that in case of winding up the company, the holders of shares will not be treated equally that it its normal for the articles of companies to give the preference shareholders a priority to return of capital over the ordinary shareholders. This right is deemed to be exhaustive that it is presumed that the rights of preference shareholders have been specified. They, therefore, have no right to share in the distribution of any assets that remain after all the capital has been returned. However, Professor Janet Dine summarized the differentiation between the two types of the shareholders in respect of return of capital after winding up the company as:

> *"The preference shareholders have the right to return their capital as well as the ordinary shareholders. If after these two operations there is still a surplus for distribution, there is a question as to whether the preference shareholders may participate in the distribution of the surplus. These two dilemmas are showed by:*
>
> *(1) The presumption that all shareholders should be treated equally so that unless there is specific right spelled out in the documents giving the preference shareholders a preference as to the repayment capital then they have no such preference.*
>
> *(2)The rule that where a preference as far as the repayment of capital is expressed, the rights set out in the documents describe the totality of the rights as far as capital is concerned. The description of rights is said to be exhaustive; where a preference as to capital is given to preference shareholders,*

[150] - L.C.B Gower, *supra note 1* at 719.

they will therefore not participate in any surplus remaining after capital has been repaid unless an express right to do so is written into the issues of documents, the memorandum or articles."[151]

(2) The inherent equal rights

This category of rights should be equally exercised between the different types of shareholders whether preference or ordinary. This category concerned with the following rights:

(a)The right of a shareholder not to have his obligations to the company increased without his consent:

As we have previously mentioned that the obligations of a shareholder in a company limited by shares does not exceed his obligation to pay for the unpaid nominal value of his shares, and to repay the amount of unlawful distribution of dividends. The holder in such types of companies is under no obligation to any further payment to the company. So if the directors, and for any purpose, for example to enter in any contract, have no right to make a call on the fully paid shares to pay any further amount of money. Another example is that the liquidator cannot require the holders of fully paid shares to pay any further amounts to the creditors.

This right is one of the main features of the limited liability which protects the private properties of the shareholders. So any amount other than the nominal value of shares is a private property and is insulated from the claims of the company creditors. This is the decision in the English case (Hole v. Garnsey "1930")[152].

(b) The right of a shareholder to prevent an irregular forfeiture of shares:

Directors of a company may demand the shareholder to pay the unpaid nominal value of his shares through many calls. Another call should be made in the case of non payment, then the directors have the right to make a "lien" on the unpaid shares, also directors may forfeit the unpaid shares. Directors may forfeit shares only if expressly authorized to do so by the articles and only for non payment of shares on a call.

Table A reg.25 of the (SCA) 1925 and Table A reg.17of the (ECA) 1985 provide that if a call remains unpaid after it has become due and payable the directors may give to the person from it is due not less than 14 days notice requiring payment of the

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[151] - Janet Dine, *supra note 7* at 297, 298.
[152] - [1930] AC 472.

amount unpaid together with any interest which may have occurred. The notice shall name the place where payment is to be made and shall state that if the notice is not complied with the shares in respect of which the calls was made will be liable to be forfeited. Any forfeiture must satisfy the conditions specified by Table A and if no, the forfeiture will be an irregular forfeiture and the shareholder has the right to prevent such forfeiture regardless of the type of the share he holds. So this right is an inherent equal between the types of holders. The forfeiture is an irregular forfeiture if:

1- Directors are not authorized to do so (by articles).

2- Shareholder has not been notified to pay for his unpaid shares in the named period of time (14 days).

3- The notification does not specify place and date of payment

4- The notification does not explicitly state that failing to pay will inevitably lead that the share be forfeited

The right of a shareholder to prevent an irregular forfeiture of shares was early established in the English Law by the decision in (Johnson v. Lyttle Iron Agency "1877")[153].

(c) The right of a shareholder to prevent ultra vires act:

The ultra vires rule was established by the English case (Ashbury Railway Carriage and Iron Co. "1875")[154]. In this case the memorandum gave the company the right to make and sell railway carriages. The company purported to buy a concession for constructing a railway in Belgium. Later the directors repudiated the contract and were sued. Their defense was that the contract was ultra vires, *i.e.* out side the memorandum. The court held that the contract made by the directors of such a company in a matter not included in the memorandum of association was not binding in the company even though it was expressly assent to by all shareholders. This was because of the principle of agency law that an agent (in this case a director) cannot have power more than the principal (in this case the company)

It is clear that prior to 1989 in England the basic rule was that an act out side the object clause was ultra vires and void and therefore could not be enforced by the company and outsiders. This was unpopular with the companies (for whom it could be inconvenient to have restricted power) and directors (who might find that their contracts could not be enforced). This was generally

[153] - [1877] 5 Ch D 687.
[154] - [1875] LR 7 HL 653.

the case if the outsider did not actually know of the restriction on the company's power. Companies therefore sought to void the ultra vires rule by drafting lengthily object clauses allowing them to do almost everything they could ever wish to do. They usually included general powers allowing them to carry any thing in incidental to any of their other objects and powers. The effect of the ultra vires rule was further restricted by s. 35 of the (ECA) 1985 (now repealed) which stated that if an outsider dealt with the company in good faith, any transaction decided on by the directors would be deemed to be within the company capacity, regardless of any limitation in the memorandum or articles.

The 1989 (ECA) has abolished the application of ultra vires in respect of outsiders, but retained the power of members to bring proceedings to restrain ultra vires acts. This ensured that commercial transaction cannot set a side once they have been entered into, but retains some member's rights.

By s. 108 of the (ECA) 1989 any member may bring proceedings to restrain an intended act which would be beyond the capacity of the company. However, this right is restricted in that if a company is required to carry out an ultra vires act in pursuance of a legal obligation arising from a previous act of the company, the company can proceed and members cannot bring proceedings to restrain that act.

However, it is appears that by s.108 of the (ECA) any member has the right to prevent the proposed ultra vires act. So this right is an inherent equal right between the different types of the holders of the shares whether preference or ordinary.

Despite the developments in the English Companies Law (from which the (SCA) was derived) in concern of the ultra vires rule, there is no any developments in concern of this rule in the (SCA) since 1925.

(d)The right of a member to transfer his shares:

It is likely to start the exposition of this right by Gower's' statement;

> *"Prima facie company's shares are freely transferable. It is this feature which constitutes one of the great advantages of an incorporated company. Unless the company's regulations provide otherwise, shareholder is entitled to transfer to whom he will."*[155]

[155] - L.C.B Gower, *supra note 1* at 445.

From this statement we can imply that this right is one of the most favorable rights which attract investors to form a company or buy company's shares.

In the private companies and to retain the control of the company, the articles usually contain either a pre-emption clause *i.e.* that no shares shall be transferred to an outsider as long as a member can be found to purchase them at a fair price, determined in accordance with the articles or a power vested in the directors to refuse to register a transfer. The mentioned restrictions are usually in the private companies. The restrictions in the public company began to decline many decades ago. So, we can say nowadays the right of a shareholder (in a public company in England) is almost an inherent equal right, and no differentiation between the holders of the two types of shares, preference or ordinary.

The right of a shareholder to transfer his shares was early agreed in the English Law by the decision in the old English case (Re. Smith Knight and Co. v. Bank of Australia "1898")[156].

On death of a member, his shares are transmitted to his personal representatives under a will or on intestacy. The personal representatives can registers as members, and vote on resolutions, but they must in due course dispose of the shares under the term of the will or intestacy rules. Alternatively personal representatives can dispose of shares directly to the deceased beneficiaries, without ever them selves becoming members.

(e)The right to have set aside an allotment of shares made for an improper purpose:

The subscribers to the memorandum will be the first shareholders. Each must take at least one share, and may take many more, subsequently, the directors will usually be responsible for allotting and issuing shares, and they may be given authority by the articles. In the (ECA) 1985 the authority given to directors has limits, these are:

1. A share must not take total holdings beyond the current nominal capital, but share holders can also raise the nominal capital by ordinary or written resolution.
2. A public company. By s.10 of the (ECA), must not allot a share unless at least one-quarter of the share's nominal value, and the whole of any premium on it, have been received.

[156] - [1898] 2 Ch 469.

3. By s. 29 of the (ECA) 1985, for both public and private companies, if it is proposed to offer new shares for cash to specific buyers, the existing members must first be given pre-emption in proportion to their existing holdings, they must have at least 21 days notice, and this can give some protection to their existing rights in the company. This can, however be excluded by the articles or by (s.r.). Alternatively, the articles may give pre-emption rights if shares are offered other than for cash, for example in exchange for other assets.
4. The authority of directors may be restricted by the company itself. The article or resolution might only authorized them to issue ordinary shares, not preference, for example the authorization must impose a maximum number or amount which they may issue, also, when the authority expires, normally after five years. These limits may be extended by another, duly registered resolution. Authorized by written resolution in a private need have no time limit.
5. Above all, there is equitable general rule that directors must exercise their powers for the benefit of the company as a whole. They must not for instance act mainly to protect or increase their own interests. In (Piercy v. Mills & Co Ltd "1920")[157] the directors issued voting shares to themselves and their supporters, not because the company needed the extra capital, but solely to prevent the election of rival directors. The issue was held void. Also in (Howard Smith v. Ampol Petroleum "1973")[158], the directors of M Ltd. issued 4, 5 million new shares to Smith Ltd., so as to change the balance of powers in M Ltd. After the issue, the previous majority shareholders, Ampol, would no longer have a majority. The issue was set aside. By the decisions in the two cases, we can say that the shareholder has an inherent equal right to have set aside the allotment of shares made for an improper purpose , regardless of the type of his share whether preference or ordinary share.

(f)The right of a shareholder to share certificate issued to him:

Every company must complete share certificates and have them ready for delivery within two months (three months in the

[157] - [1920] 1 Ch. 776.
[158] - [1974] A. C. 821.

(ECA) 1985) after the allotment of any of its shares or after the date in which the transfer of its shares is lodged for registration, unless the conditions of issue otherwise provides, under penalty of default a fine (s. 185 of the (ECA) 1985)[159].

The share certificate is a formal statement by the company under its common seal if it has one, or of its official seal or other wise signed by the company in accordance of the law. The purpose of the share certificate is to give the shareholder some document which can use as an evidence of his title. It also provides the company with a check on the identity of the registered shareholder, and the company will not normally accept any dealing unless the certificate is produced.[160]

The share certificate may give rise to estopple against the company. The company cannot deny the truth of the certificate against a person who has relied on the certificate and in consequence has changed his position. In the English case (Re Bahia and San Francisco R-lwy Co. "1868") [161]T. the registered holder of share, left the share certificate with her broker. T's signature was to transfer in favor of S. T. did not reply to the notice of the transfer sent to her by the company and a new certificate in the name of S. was issued by the company. A bought from S. and paid for the shares on delivery of the share certificate and a new share certificate was issued to A. The fraud was subsequently discovered and T's name was restored to the register. Held, the company was liable to indemnify A. The giving of the certificate to S. amounted to a statement by the company, intended to be acted upon by purchaser of shares in the market, that S. was entitled to the share, and A. was entitled to recover from the company and damages the value of the share at the time when the company first refused to recognize him as a shareholder, with interests.

Professor Gower said:

> *"A share certificate is in no sense a contractual document and, although under the companies seal, it is not a deed. The holder legal rights depend not on the certificate but upon entry in the register, and the certificate is merely a declaration by the company stating what these rights are an affording prima facie evidence of them. It is totally different from the documents of the title of un registered land, which consist of the deeds disposing of the property itself, but exactly comparable to the land certificate issued by the land register*

[159] - Geoffrey Morse, *supra note 17* at 191.
[160] - L.C.B Gower, *supra note 1* at 435.
[161] - [1868] L.R. 3 QB. 584.

in respect of registered land, indeed land registration is an attempt to adopt the procedures relating to shares to the more complicated case of land."[162]

However, the issuing of the share certificate to the shareholder is an inherent equal right, and the ordinary shareholder as well as the preference shareholder has the right to a share certificate.

(g)The right of a shareholder to inspect documents and registers kept by the company:

The shareholder has aright to inspect the following registers and documents which are usually kept at the registered office of the company:

1- The register of members.
2- The register of directors and secretaries.
3- The directors' interests in shares and debentures.
4- The register of debentures holders.
5- The register of charges.
6- Copies of the instruments creating the charges.
7- The minute book of general meeting.
8- Directors' services contracts.
9- The minute book of directors meetings.
10- The accounting records.

The above register and documents which every company is required to keep by law, they are subject to the right of inspection, and this right is an inherent equal right between the two types of holders, preference or ordinary.

(h) The right of a shareholder to have the register of members rectified (see chapter 1 part "5"). This right is also an inherent equal right between the different types of shareholders preference and ordinary.

(i) The right of a shareholder to a copy of balance sheet and statutory report:

For most shareholders, the main source of information is the company's statutory annual accounts and the statutory directors' and auditors' reports which must accompany them.

Every company must choose an accounting reference date, if it does not, then the date will be the last day of the month one year after incorporation. This then determines the company's' "accounting reference period" and "financial year". For each

[162] - L.C.B Gower, *supra note 1* at 435.

financial year the company must produce annual accounts and reports, and circulate these to shareholders and debentures holders.

The accounts must comprise a "profits and losses account", giving a true and fair view of the state affairs of the company as at the end of the financial year.

There must be detailed provisions for the accounts to be approved by the board of directors. There must be a balance sheet signed by a director on behalf of the board, and his name must appear on copies sent to members.

The right to receive copies of statutory report and balance sheet is an inherent equal right between shareholders preference and ordinary.

Conclusion:

The scope of the juridical nature of the share is vague since that the share does not confer its holder a right to a physical possession of any thing. The share confers the holder number of rights. However, Farwell J. in the famous English case (Borland's Trustee v Steel)[163]defined the share as "The interest of a shareholder in the company measured by a sum of money, for the purpose of the liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders."

The share may be preference or ordinary. Preference share confer his holder priority over the ordinary shareholder in concern of some rights, normally in the right to the company's dividends and the right to return of capital after winding up the company. In some other rights preferentiality is not applicable that these rights, by their nature, are not preferable *i.e.* preference and ordinary shareholders must be treated equally in concern of these shares.

[163] - [1951] 1 Ch. 29.

Chapter (3)

The Balance of Powers and Shareholders' Relief

Introduction:

From a theoretical view point, shareholders who are the owners of the company and decision makers, the decision in a company is presumed to be passed through certain mechanisms agreed by shareholders formerly. Therefore, outsiders and not shareholders are the persons who are expected to go into disputes with the company to enforce their rights against the company. This theoretical view point may be faced by that in the English Law and consequently in all countries which follow the common law (like the Sudan); the legislature put shareholders in a serious disadvantageous position. Save in so far the constituent documents of the company (being the memorandum and articles of association) do not provide otherwise, the management and control of the company is vested in its board of directors and as such the members and shareholders of the company have no direct say in its management and control unless they also happen to be in the board of directors.

In fact and from a practical view point, in the Common Law and in the (ECA), and consequently in countries which follow the common law, many mechanisms have been created to relief shareholders' grievances. This means that in these countries (included the Sudan), despite this theoretical point of shareholders' control, the law in these countries recognizes many cases in which shareholders rights may be violated, therefore, this chapter will be concerned with the control of the company management, members' statutory relief and members' Common Law relief.

(i)The Control of Management:-

(1) Directors control of management:

It was stated by Greer LJ in (John Shaw & Sons "Sal ford" Ltd. v. Shaw):

"If the powers of management are vested in the directors, they and they alone can exercise these powers. The only way in which the general bodies of the company shareholders control the exercise of the powers vested by the articles in the

directors is by altering their articles, or, if the opportunity arises under the articles, by refusing to re elect the directors of those actions they disapprove. They cannot themselves usurp the powers which by the articles are vested in the directors any more than the directors can usurp the powers vested by the articles in the general body of shareholders"[164].

By the decision in above case and the decisions in the 20th century, for example the decision in (Quinn & Ax tens Ltd. v. Salmon)[165], (Automatic Cleaning Syndicates Co.)[166], appears that if the articles of association are silent on determining who controls the company, the control of the company is exclusively vested in the board. But "it would appear that if the articles of association are silent in the point then on the basis of the principles used in 19th century cases ultimate control of the company may well be vested in the company in general meeting *i.e.* in the shareholders themselves. However, it is almost un heard for articles of association in modern times not to allocate the power of control of a company between the directors and shareholders by way of provisions in the articles of association, and the current usual provision in the Companies Act"[167]. These provisions in Table A of the (SCA) 1925 and (ECA) 1985.From the mentioned Tables we can say that there are some things in a company which can only be done by a resolution of shareholders, such as a change of the name of the company, objects, nominal capital or articles. Moreover, members can give directions to the board by a special resolution. Subject to this however, the directors have wide powers which depend on the articles. Table A reg.70 provides that" The business of the company shall be managed by the directors, who may exercise all the powers of the company".

Directors powers must generally be exercised as a board in its meeting (directors meeting). These can be called by a company secretary at request of any director. The board can agree without meeting if each member signed a written resolution. The articles usually fixed a quorum for meetings, and power to elect chairman. Decisions are taken by a majority; often with a chairman have a casting vote. Generally each member of the board of directors has one vote regardless of his

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[164] - [1935] 2 KB 113 at 134.
[165] - [1909] A C 442.
[166] - [1906] 2 Ch 34.
[167] - Peter Willcocks, *Shareholders' Rights and Remedies* at 6 (1st ed. "1991".).

shareholdings. Minutes must be kept available to directors but not shareholders

Individual director as such has no authority to act on behalf of the company, unless the board has expressly or impliedly delegated to him powers. Directors also may have service (employment contracts) with the company. And these can often affect their relation with the company.

In Sudan there are many statutory controls over the directors' powers. Most of these controls contained in ss. (28), (63"1"), (70"2"), (70"5"), (70"7"), (71"1"), (71"4") and (85"2"). All these controls in the Sudanese Act 1925 connect with some formalities which must be followed by the directors, for example s. (71"1") of the (SCA) 1925 provides that the board of directors must make a call for an extra ordinary meeting on request of one tenth of the shareholders.

In England there are many statutory controls over the power of directors. Most of the statutory provisions arise where there is a potential conflict between the personal interest of the director and the interests of the company, for example by s.317 of the 1985 Companies Act, it is a duty of a director who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the company to declare the nature of his interest at a meeting of directors. This also applied to contracts with persons connected with the director, such as spouse, infant children, and associated companies in which the director or his family have a one-fifth share interest.

By s.319, director services contract for 5 years which cannot be ended earlier by the company, must be approved by an ordinary resolution of members. If Table A applies a director cannot vote on his own contract, a copy must be kept at the recognized office. A contract which is not approved may be ended by the company on reasonable notice.

By s.320 of the (ECA) 1985, a company must have the approval of shareholders, by ordinary resolution, before any contract for valuable property with any of its directors. The "requisite value" is currently £ 100,000 or over 10% of the company's assets, with £ 2000 minimum. If the approval is not obtained, the contract is avoidable by the company. The directors must account for any profits, and other directors who authorized the transaction must indemnify the company against losses.

Sections 330-347 of The (ECA) 1985 impose detailed constraints on loans and credit to directors. A loan over £ 5000 to the director is generally unlawful, but there are exceptions,

particularly to help a director to meet expenditure which he incurred for the purpose of the company, or to enable him to perform his duties properly.

(2) Members' control of management.

As we have previously mentioned at the beginning of this chapter, members control in the modern companies is to exercise limited authorities, such as the change of the company's name, objects, nominal capital or articles, but members of a company can exercise wide authorities by stating in the articles for these authorities. Another way for members is by amending the articles of association. This latter method has always been available to the members for removing exclusive control of the company from the directors (the amendment of article need 75% majority), but the alteration will not invalidate any prior act of the directors which would have been valid if that amendment had not been made[168].

The problem of members' control of the company is usually arising in one of three situations:

(a) Where a board of directors has been appointed by a majority of members acting in such a manner, which although not objectionable to the minority. In this instance the minority simply do not have the voting power at general meetings to remove the board and appoint new directors.

(b) Due to circumstances or, more usually, provisions in the article of association, the board of directors represents a minority of shareholders, at least in terms of numbers rather than voting power, and because of the inability of the majority either to amend the articles of association (due to requirements of a 75% majority) or because of the inability of the majority to mobilize sufficient number to pass the resolution the course of action taken by the board of directors is objectionable to the majority rather than to the minority

(c) Where the shareholding is equally divided between two opposing numbers (or groups of members) so that neither has a majority vote enabling him to remove or appoint directors.[169]

(ii) Members statutory relief:-

(1) Unfair prejudice conduct :

[168] - Id at 7.
[169] - Id at 3.

In the (ECA) by s.459, a member may petition the court for an order on the ground that the affairs of the company are being or have been conducted on a manner which is unfairly prejudicial for the interest of its members generally or some part of the members (including at least himself) or any that proposed act or omission of the company is or would be so prejudicial.

The defendants conduct must be both unfair and prejudicial[170]. In the English case (Re London School of Electronics Ltd.)[171], the petitioner held 25% of the shares of the London School of Electronics (the company). The remaining 75% where held by City Tutorial College, which was controlled by two others persons. A dispute arose between the petitioner and City Tutorial College because C.T.C appropriated for itself students who approached the company. The petitioner the set up a rival college known as the London College for Electronic Engineering and took with him a number of students who had enrolled with the company. The petitioner claimed that City Tutorial College conduct was unfairly prejudicial. His action was successful. The judge rejected the defense that the petitioner did not come to the court with clean hands because he had taken some of the company's students. The petitioner conduct would only be relevant if it renders of other sides' conduct, even if prejudicial, not unfair or if it affected the relief that the court thought fit to grant. The judge ordered that the majority should purchase the shares of the minority and that the price would be calculated pro rata, *i.e.* the value of 25% shareholding will not be discounted because it was a minority interest. The date of the petition was used to ascertain the price.

By the decision in the above case and by the requirements of s.459, a number of questions may be arising such as what is the meaning of "conduct of company's affairs? Must there be infringement of a legal right to show unfair prejudice, what interests in the company must the petitioner has and in what capacity must the defendant be complaining[172]

About the "conduct of companies' affairs", Professor Janet Dine said:

> *"The decision in the two following cases early appeared the meaning of (conduct of company affairs). In Re A Company (No. 00761 of 1986)[173]the court held, the act of a shareholder*

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[170] - Janet Dine. *Company Law* at 279. (4th ed. "2001").
[171] - [1985] Ch 211.
[172] - Janet Dine, *supra note 7* at 279.
[173] - [1987] BCLC 141.

in a personal capacity out side the conduct of the company's affairs were irrelevant. Thus the court was not interested in "an attempt to blacken the respondent's name and to make the court look on her with disfavor as an immoral and attractive woman". (In Red Label Fashion. Ltd.)[174] The respondent was alleged to be subject to disqualifications proceedings as a "de facto" director. Although she had been in business with her director husband, the court held that there was no evidence that she assumed the role of director and exercised management responsibilities. She had acted as "a dutiful wife" rather than as a director."

About the infringement of legal rights, it appears that the concept of unfair prejudice is wider than the infringement of a legal right such as the right to dividends, the right to vote or the right to return of capital on winding up. For example, it was held that the member's interest in a private company may include a legitimate expectations that he will continue to be employed as a director and his dismissal from that office and exclusion from the management of the company may therefore be unfairly prejudicial to his interests as a member[175]. The important case of (Re Saul D Harrison & Sons PLC) [176]contains an extensive analysis of the operation of s.459 to protect "legitimate expectations". Hoffman LJ said:

"In deciding what is fair for the persons of s.459, it is important to have in mind that fairness is being used in the context of a commercial relationship. The articles of association are just what their name implies; the contractual terms which govern the relation ship of the shareholders with the company and each other…Since keeping promises and honoring agreements is probably the most important element of commercial fairness, the starting point on any case under s.459 will be to ask whether the conduct of which the shareholder complains was in accordance with the articles of association…Although one begins with the articles and the powers of the board, a finding that conduct was not in accordance with the articles does not necessarily mean that it was unfair, still less that the court will exercise its direction at grant relief. There is often sound sense in the rule in Foss v. Harbottle[177]. In choosing the term "unfairly prejudicial" the

[174] - [1999] BCC 308.
[175] - Re A company [1986] BCLC 376.
[176] - [1995] 1 BCLC 14.
[177] - [1843] 2 Hare 461.

Jenkins committee (Para. 204) equated it with Lord Cooper's understanding of "oppression" in Elder v. Elder and Watson[178]"a visible departure from the standards of fair dealing and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely". So trivial or technical infringements of the articles were not intended to give rise to petition under s.459"[179]

Hoffman J goes on to point out that technically lawful actions may be unfair, he said: "the personal relationship between shareholders and those control the company may entitle him to say that it would in certain circumstances be unfair for them to exercises a power conferred by the articles upon the board or the company in general meeting. I have in the past ventured to borrow from public law the term "legitimate expectations" to describe the correlative "right" in shareholder to which such a relationship may give rise. It often arises out of a fundamental understanding between the shareholders which formed the basis of their association but it was not put into contractual form, such as an assumption that each of the parties who has ventured his capital will also participate in the management of the company and receive the return of his investment in the form of salary rather than dividend.

About what interest in the company must the petitioner have? The court in (R & H Electric and Another v. Haden Bill Electric Ltd.)[180]Held that a board view should be taken of the capacity in which a petitioner complained for the purpose of s.459 (2). In this case a company controlled by P. was a major creditor of Haden Bill Electrical (H.B). P was a creditor and chairman of (H.B) until relationships broke down and he was removed at short notice. The court held that P. could rely on his interests in having being instrumental in raising the loan through his company and the understandings that flowed from that and was not just confined to his interest as a shareholder.

Also s.459 (2) of the (ECA) 1985 allows those to whom shares has been transferred or transmitted by operation of law, for example by inheritance, to complain.

About the capacity in which the complaint be made. By s.459 a person has the right to complain in his capacity as a member. As we have previously mentioned in the first chapter; the concept

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178 - [1952] SC 49.
179 - Janet Dine, *supra note 7* at 281.
180 - [1995] 2 BCLC 280.

of the word member, in company law is wider than the word "shareholder" that the word member includes other categories of persons in addition to the shareholders[181].

Professor Geoffrey Mores ascertain the powers of the court to relief the member of the company[182]in case of unfair prejudice conduct of the company by that the court may make any order it thinks fit, although the petitioner is required to state in his petition what form of relief he seeks the court may make:

(a) An order regulating the affairs of the company in the future, for example in the English case (Re Harmer "1959") [183]a successful company was controlled by Mr. H. He and his wife (who always voted with him) could control both ordinary and special resolutions at general meetings. The directors were Mr. and Mrs. and their two sons. Mr. H. was the chairman and had a casting vote. The two sons brought the action on the ground that their father repeatedly abused his controlling power, particularly with respect to the appointment and dismissal of staff, and the opening of a branch in Australia (this was opposed by the sons and proved to be an unsuccessful venture). Mr. H. was generally intolerant of views contrary to his own, whether held by his sons or other shareholders. At the time of hearing Mr. H. was 89 years old.
The court granted an order under s.210 (1948 Act) now s.459 since there had been a course of oppressive conducts (now known as unfair prejudicial conduct). The order removed Mr. H. from the board and made him "president" of the company for the life at a salary of £2500 per year. This post gave him no right, and imposed no duties on him. It was directed he should not interfere with the affairs of the company except in accordance with the decisions of the board.

(b)The court may make an order requiring the company to do or to refrain from doing any act. Thus the court may require the company not to make any alteration either to its memorandum or articles, or to make specific alteration.

(c) The court may make an order authorizing civil proceedings to be brought in the name and on behalf of the company by such persons and such terms as the court may direct (this is important because if the court authorizing proceedings a minority shareholder can sue a director on behalf of the

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[181] - See chapter 1 (part vi) of this thesis.
[182] - Geoffrey Morse, *Cahrlesworth & Morse Company Law* at 329. (16th ed. 1999).
[183] - [1959] 1 W.L.R. 62, CA.

company even if he cannot bring his claim within one of the exceptions to the rule in Foss v. Harbottle.

(d) The court may make an order providing for the purchase of any member's shares by other members or a purchase of such shares by the company itself. In the latter case it will arrange for the reduction of capital accordingly.

(e) The court may make an order providing the purchase of the majority shareholder's shares. In (Re Nuneaton Borough Association Football Club "1991") [184]the petitioner, S, had acquired 24000 £1 shares in the club when the authorized capital was apparently only £2000 divided into 2000 shares. The respondent accepted that the company had never validly increased its share capital. Thus the petitioner had paid a substantial sum of money for shares that did not legally exist. The court therefore, held that the affairs of the company had been conducted in a manner unfairly prejudicial to S. The case is interesting because the order made was that K. (the chairman of the board and majority shareholder) should transfer to S. the 1,007 shares which he held out of the 2000 validly created and issued shares. The consideration for the transfer would be payment of the true market for blocks of controlling shares, determined by reference to the price such shares would fetch in the open market between a willing seller and a willing buyer. The case was complicated by the fact that K. and a company controlled by him had made substantial interest free loans to the club. The court decided that it would not be fair to order K. to relinquish his controlling interest without also ordering the payment of the loans. The decision is of importance because it represents a rare example of a majority shareholder being ordered to sell his shareholding to the petitioner.

Finally, and from a practical point of view, in the English Law a petition under s.459 have been successful in the following situations: *Firstly,* where directors of a private company made incorrect statements to their shareholders regarding acceptance of an offer for their shares made by another company owned by the directors. *Secondly*, where the majority made a rights issue with a view to altering the voting balance, because they knew that the minority shareholder could not afford to exercise his right to purchase. *Thirdly,* where the majority made a right issue with a view to depleting the fund if a shareholder engaged in litigation

[184] - Re [1991] B.C.C. 44.

with the company or with the majority shareholders[185], although it is difficult to draw the cases together to draw a clear picture of unfair prejudice, several points have become clear:
(*) Illegality is not necessary to show unfair prejudice.
(*) The test of what constitutes unfairly prejudicial conduct is objective, bad faith or lack of fair dealing by those in control being irrelevant.
(*) The remedy can be use to enforce a director's fiduciary duties.
(*) The word "interests" is wider than rights and a member may present a petition even if his rights as a member have not been affected[186].

(2) Winding Up on The Just and Equitable Ground:

The second and the more commonly utilized members' statutory relief is the power of a member to apply to the court for winding up the company. The court may order the winding up of the company if it is of the opinion that it is just and equitable that the company wound up (s.122 (1)"g" of the Insolvency Act 1986).

S.122(1)"g" of the Insolvency Act 1986 is qualified by s.125 of the same Act, where the company should not be wound up if some other remedy is available to the petitioners, and the court is of the opinion that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy[187].

The leading on just and equitable ground is (Re Westbourne Galleries Ltd.)[188]This affords an excellent illustration of its scope as well as establishing a number of important principles. In this case, the petition was brought by Mr. Elibrahimi, who for many years had been an equal partner with Mr. Nazar in a business dealing in Persian Carpet. In 1958 it was decided to incorporate the business and Elibrahimi (E) and Nazar (N), who were both appointed directors, each held 500 shares. Soon after this N's son was made a director and E and N transferred 100 shares to the son. After this the Nazars held a majority of votes. In 1985, the relationship between Nazars and E began to break down. In 1969, the Nazars used their majority to remove E from his directorship. Then after he was not able to take any part in the management of business and he received no money since all payments were made to the participants in the business by the

[185] - K.R. Abbott, *Company Law* at 283 (5th ed. 1996) .
[186] - Id at 283.
[187] - Janet Dine, *supra note 7* at 285.
[188] - [1973] AC 360.

way of directors' salaries rather than dividends. The court held that the removal of E had been unlawful. Nevertheless, because the company was in essence an incorporated partnership, the Nazars had abused their power and were in breach of the good faith partners owed t o one to another. E was therefore entitled to a winding up. The decision in Elibrahimi case established that the remedy may be available even where there has been no fraud or wrong doing.[189]The types on which the "just and equitable ground is applied are:

(a) When the substratum of the company has gone *i.e.* the main purpose for which the company was formed has been fulfilled or has become incapable of achievement. In (Re Bleriot Aircraft Co. 1916.)[190]A company was formed to acquire the English part of an aircraft business owned by the well known French airman M. Bleriot. M. Bleriot however refuses to agree to the acquisition. It was held that the company be wound up because its main object had failed.

(b) Where there is dead lock in the management of business because the directors cannot agree on vital matters or become personally antagonistic. In (Re Yenidji Tobacco Company Co. - 1916) [191]the company had two shareholders who were both directors. Although the company was successful the directors failed to agree many important matters, for example the appointment of the senior employees. They would not speak to each other and all communication was via the company secretary. It was held that the winding up was justified.

(c) Where there is justifiable lack of confidence in the management. In (Loch v. John Blackwood – 1924) [192]the directors failed to call meetings, submit accounts or recommended a dividend. The reason was to keep the petitioners ignorant as to the value of the company, so that the directors could acquire their shares at an under evaluation. Winding up was ordered.

(iii) Member's Common Law Relief:-

[189] - L.C.B Gower, *Principles of Modern Company Law* at 661 (4th ed. 1979).
[190] - [1916] Re 32 T.L.R. 325.
[191] - [1916] Re 2 Ch. 426.
[192] - [1924] A.C. 783.

In addition to the various statutory remedies detailed above there are common law obligations which exist within a corporate structure, the enforcement of which can comprise a further two member's remedies. These obligations can essentially be divided into two separate areas:

(1) Obligations owed by the directors to the company.
(2) Obligations owed by the company to the members.

These Common Law obligations owed by a company to its members (and enforcement thereof) are the subject of what called (the personal action). The Common Law obligations owed by the directors to the company are subject to what called (the derivative action).

(1) The Derivative Action:

It was settled in the Common law that directors owe their obligations or duties (being the duty of care, diligence and skill and fiduciary duty) and in the event of breach of these duties the company is the proper plaintiff.

In the famous English case (Foss v. Harbottle)[193]two members brought an action against the directors of a company to compel them to make good a loss suffered by the company as a result of the defendants selling their own land to the company at more than it was worth. It was held that the action failed. The wrong was done to the company and there was nothing to stop the company taking action if it chooses to do so. A more recent example for the rule in (Foss v. Harbottle) is in (Pavlides v. Jensen) [194]where the directors sold an asset of the company to a third party at a gross under evaluation. A minority shareholder commenced an action. It was held that he could not do so; it was up to the company to decide whether to sue the directors for negligence. Alternatively the company could decide to exonerate them.

Despite the criticisms to the decision in (Foss v. Harbottle), there are nevertheless reasons for the rule. The *first* reason is that it is logical a consequence of the fact that the company is a separate legal person. It is that the company who suffered a loss, therefore it is the proper plaintiff. The *second* reason it preserve the principle of majority rule. The *third* reason it prevents multiple actions, so if each shareholder were permitted to sue, the company might be subjected to many law suits started by

[193] - [1843] 2 Hare 461.
[194] - [1956] Ch. 565.

numerous plaintiffs. The *fourth* it prevent futile actions. If the irregularity is one which be ratified by the company in general meeting, it would be futile to have litigation about it without the consent of the general meeting.

On other hand the rule in Foss v. Harbottle may be criticized in that "it would seem that the rule in Foss v. Harbottle would remove from the directors the restrains and the controls of their Common Law duties for clearly it is unlikely that the director would cause the company to seek relief against themselves".[195]However, and not surprisingly, there have arisen certain exceptions to the rule in Foss v. Harbottle to a degree that the rule is possibly better known for its exceptions rather the rule itself[196].

The rule is subject to a number of exceptions, in which case a minority of shareholders, or even an individual shareholder, may bring a minority shareholder's actions. Usually the minority shareholders sue on behalf of themselves and all other shareholders except those who are defendants, and may join the company as a defendant. The directors or majority shareholders are usually defendants. This action is brought instead of an action in the name of the company. A member may bring a derivative action in respect of wrongs done before that person become a member, but it may not be continued by him after he has ceased to be member.

Not withstanding that the derivative action constitutes a representative action there is nothing to prevent the action being brought where there is only shareholder although it is difficult t o see how the case would never fall within the exceptions to the rule in Foss v. Harbottle. Neither is it any objection that the plaintiff's interest in the company is only nominal.[197]

The nature of the derivative action is that it is a "procedural device for enabling the court to do justice to a company controlled by miscreant directors of shareholders. It follow that the court is entitled to examine the conduct of whoever intends to start such proceedings, the person must be doing so far the benefit of the company and not for some other purpose, also the plaintiff must come to the court with clean hands[198]. In the English case (Nurcombe v. Nurcumbe 1985)[199]a husband and

[195] - Peter Willcocks, *supra note 4* at 71.
[196] - Id at 71.
[197] - Id at 78.
[198] - L.C.B Gower, *supra note 25* at 626
[199] - [1985] 1 W.L.R 370 CA.

wife were only directors and shareholders of a small company. In breach of fiduciary duty H diverted company contracts to another company in which he had interest. Latter in divorce proceedings W was awarded a lump sum which took account of H's improper profit. W then commenced a derivative action on behalf of the company to recover the lost profit for the company. The court of appeal rejected her claim since she had, in effect, already recovered the profit as part of the divorce settlement.

It is interesting that the judge in the divorce proceedings ignored the corporate veil when he ordered H to make a personal payment based in the improper profit of a company in which he had an interest. The Court of Appeal also lifted the veil when they refused to allow H and W's original company to recover because W personally had already been compensated.

A defendant to a derivative action can rise many defenses which he would have raised had the action been brought by the shareholder personally.

The exceptions to Foss v. Harbottle for which the derivative action can be brought are:

(a) Where the act is one which illegal or ultra vires the company's powers.

Under the (ECA) 1985, even one shareholder can restrain an ultra vires act; so long this does not break a contract with the company already made. There seems to be some doubt as to whether this exception is applied where the ultra vires act has been completed. It seems settled that this exception applies where the ultra vires act is proposed or still continuing. If the ultra vires act has been completed then and by the decision in the English case (Hawkesbury Development Co. Ltd. v. Landmark Finance Pty Ltd. 1969)[200], this exception to the rule in Foss v. Harbottle is applicable[201] . However, the proposal to act can proceed if it is ratified by special resolution of members (s.35"3"). Even if the act is illegal *e.g*. under the Companies Act, however the majority may validly resolve to take no action to remedy the wrong done and if that resolution is made in good faith and in what the majority consider to be for the benefit of the company, it will bind the minority[202].

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[200] - [1969] 2.N.S.W.R. 782.
[201] - Peter Willcocks, *supra note 4* at 82.
[202] - Geoffrey Morse, *supra note 18* at 82.

In (Smith v. Croft -1987)[203]the action involved alleged payments by the directors by breach of s. 151 of the (ECA) 1985 *i.e.* the financial assistant rules, which if proved would have been illegal. The judge held that an individual shareholder did not have an absolute right to bring a derivative action on that basis to recover money so spent, as distinct from preventing it beforehand. Such right of recovery would only be available if the company has such right. In that case the majority of independent shareholder did not wish the action for recovery to be brought and the judge regarded that as a sufficient reason to disallow the action. In this case Knox J said:

> *"Ultimately the question which has to be answered is; is the plaintiff being prevented improperly from bringing the proceedings on behalf of the company? if it is an expression of the corporate will of the company by an appropriate independent organ that is preventing the plaintiff from prosecuting the action he is not improperly but properly prevented and so the answer to the question is No. The appropriate independent organ will vary according to the constitution of the company concerned and the identity of the defendants, who will in most cases be disqualified from participating by voting in expressing the corporate, will"*

(b) Where the matter of which complaint is made in one which can only be validly done or sanctioned by a majority in excess of a simple majority:

Whilst reference to majorities able to pass special resolution text, it would appear that the requirement is that the required majority to be more than a simple majority in order to bring this exception into play[204]. In (Edwards v. Halliwell)[205] Jenkins LJ stated as obiter dicta that something requiring a two third vote fell within this exception and accordingly as the matter complained of had been only passed by an ordinary majority and not two thirds, an individual member was entitled to sue[206]. The rational behind this exception is if it did not exist then any requirement in the article of association requiring a special majority could be ignored. However, both the exception and explanation are confusing, perhaps because nowhere it is stated that it must also follow that if the matter of which complaint is made is sanctioned

[203] -[1987] B.C.L.C. 335
[204] - Peter Willcocks, *supra note 18* at 83
[205] - [1950] All ER 1064.
[206]- Peter Willcocks, *supra note 18* at 83.

by the requisite special majority prior to the complaint being heard the individual member's action will fail not because the individual has no standing but because he has no wrong of which to complain. This certainly would have been the case in (Edward v. Haliwell)[207]. The exception may be better expressed as (where the matter of which complaint is made can be done by resolution of a particular majority and this majority has not been obtained).
This exception has been extended so to apply to board meetings requiring special majority in that failure to obtain the majority cannot be overridden or ratified by the company by ordinary resolution.[208]

(c)Where there is fraud on the minority by those who control the company.

Professor Pennington said;

> *"The fraud or oppression need not amount to a tort at Common Law, but it must involve an unconscionable use of majority's power resulting, or likely to result, either in financial loss or in unfair or discriminatory treatment of the minority, or it must certainly be more serious than the failure of the majority to act in the interest of the company as a whole, which will induce the court to annul a resolution altering the company's memorandum or articles"[209].*

Whilst it is clear that the expropriation of the property of the company or that of the minority and certain breaches of director's fiduciary duties to the company would constitute a fraud it is certainly not clear whether voting for a members' resolution that is not bona fide in the interest of the company as a whole will do so.[210]
In order to establish this exception it must be shown that the wrongdoers control the company. In (Prudential Assurance Co. Ltd. v. Newman Industries) [211]Vinelott J. held that de facto control was sufficient. Also in (Smith v. Croft) [212]Knox J. said:

> *"In my judgment the word "control" was deliberately placed in inverted commas by the court of appeal in (Prudential Assurance Co. Ltd. v. Newman Industries)*

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[207] - [1950] All ER 1064.
[208] - (Salmon v. Quin & Axtens Ltd. "1909") 1 Ch 311.
[209] - R.R Pennington, *Pennington's Company Law* at 73i4 (3rd ed. 1973).
[210] - Whilst Professor Pennington appears to believe that it does not, Professor Gower in his reference (*The principles of Modern Company Law* "4th ed. 1979") at. 648, appears to believe that would constitute fraud on the minority.
[211] - [1982] Ch. 204.
[212] - [1987] B.C.L.C 206.

because it was recognized that voting control by the defendants was not necessarily the sole subject of investigation. Ultimately, the question that has to be answered in order to determine whether the rule in Foss v. Harbottle applies to prevent a majority shareholder seeking relief as plaintiff for the benefit of the company is ' is the plaintiff being improperly prevented from bringing these proceedings on behalf of the company? 'It is an expression of the corporate will of the company by an appropriate independent organ that is preventing the plaintiff from prosecuting the action, he is not improperly but properly prevented and so the answer to the question is "No". The appropriate independent organ will vary according to the constitution of the company concerned and the identity of the defendants, who will in most cases, be from participating by voting in expressing the corporate will"

Knox J. concluded that it was proper to have regards to the views of independent shareholders so that it may become not a question of the majority versus minority but the question of other independent shareholders versus the plaintiff and it was stated that the majority of votes should disregarded if, but only if, the court is satisfied either that the vote or its equivalent is actually cast with a view to support the defendants rather than securing benefit of the company, or that the situation of person whose vote is considered is such that there is a substantial risk of that happening.[213]

(d)In the subsequent cases to Foss v. Harbottle it has been suggested that the derivative action is also available where justice requires that an exception be made to the rule in Foss v. Harbottle.[214]

As an example for this exception is in that where all that is alleged is damage to the company arising from a director's misfeasance in withholding an asset of the company without fraud or ultra vires as in the English case (Heyting v. Dupont – 1964)[215], In this case the company was to exploit an invention of the defendants consisting of a machine for making plastic pipes and the defendant withheld the company's patent application. However, the company could not exploit the invention because it was in a state of paralysis owing to discord, so there was no damage to the company and therefore justice did not require that exception be made. In other English case this exception to the

[213] - Geoffrey Morse, *supra note 18* at 312.
[214] - Peter Willcocks, *supra note 18* at 85.
[215] - [1964] 1 W.L.R. 843.

rule in Foss v. Harbottle is clearly stated in the decision, it was held.

> *"In the third place it is alleged that there remains open an exception to the rule in Foss v. Harbottle where justice so requires. There are to be found amongst discussions of the rule in Foss v. Harbottle some expressions of doubts as to whether there is in truth any room for any further extension of the exceptions under this broad heading …it is, perhaps, a useful door to left open lest in some extremely usual circumstances justice would result from applying the rule. No exhaustive or even descriptive statement of such circumstances has been propounded…for the purpose of the present judgment I am prepared to accept the existence of a further exception to the rule in Foss v. Harbottle where justice so requires"[216].*

(e)Further exception to the rule in Foss v. Harbottle:

was suggested in (Hodgson v. National & Local Government Officers Association)[217], namely that even if wrong would be ratified or approved by an ordinary resolution, an individual will have standing to sue if to deny such who received the dividend (apparently knowing of the illegality) were held not to be entitled to bring a derivative action against the company.

(2)The Personal Action and the Memorandum and Articles

Some times the directors may commit a wrong to the member personally rather than to the company. By the (ECA) 1985 s.14, the memorandum and articles are a contract between the members. If the directors refuse to a member his rights under the articles, the member has a right of action which is not affected by the rule in Foss v. Harbottle. In (Pender v. lushington – 1877) [218]the chairman wrongly refused to accept a shareholder's vote, which would have defeated an amendment to a resolution. Refusal infringed the member voting rights under the articles, and the injunction which he sought against directors was granted.

As we have previously mentioned that by Foss v. Harbottle that where the company has a cause of action, the company is the proper plaintiff to enforce that cause of action provided that an individual shareholder may bring a derivative action (that is an

[216] - (Hawksbury Development Co. Ltd. v. Landmark Finance Pty – 1969) 2. N.S.W.R. 782.
[217] - [1972] 1 All E. R.
[218] - [1877] 6 Ch. D. 70

action deriving out of the right of the company to bring an action) if that of which he complains cold not be validly effected or rectified by the company by ordinary resolution passed in general meeting. The essential rationale behind the rule in Foss v. Harbottle is that in the case of obligations owed to a company, the company is a proper plaintiff. However, there remains the area where obligations owed by the company to its members and in this instance a breach of the obligation entitles a member to bring proceedings against the company on his own rights rather than way of derivative action. It may well be that the action brought by the member may be a representative action if the same wrong has been done to other members. "the dividing line between personal and corporate rights is very hard to draw, and perhaps the most that can be said is that the court will incline to treat a provision in the memorandum or articles as conferring a personal right on a member only if he has a special interest in its observance distinct from the general interest which every member has in the company adhering to the terms of its constitution."[219]However, there are five bases upon which the member may have a personal action against a company these are: pursuant to contract, pursuant to common law, pursuant to Companies Act, pursuant to fiduciary duty and pursuant to the memorandum and articles of association.[220]

(a) Pursuant to contract:

A member is clearly entitled to enforce any contract between him and the company whether arising under general law or as a consequence of the memorandum and articles of association. In so far as such contract may arise at general law it is not proposed to make any further reference to this remedy available to a member as it is more properly the subject of the law of the contract.

(b) Common Law:

In the Common Law there are many rights accepted as personal rights, for example the right to restrain the company from acting ultra vires, the right of a member not to have his obligations to the company increased without his consent and the right to have set aside an allotment of shares made for an improper purpose and the like.

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[219] - R.R. Pennington, *supra note 45* at 727.
[220] - Peter Willcocks, *supra note 18* at 90.

(c) The Companies Act:

Also by the Companies Act there are many rights given to the member, for example the right of a member to have a share certificate, the right of a member to a copy of the balance sheet and statutory report and the like

(d) Fiduciary duty:

It was held that in (Percival v. Wright)[221]that the directors of a company owe their duties to the company and not to individual shareholder. This in turn has given rise to the rule in Foss v. Harbottle with the consequence that in general circumstances, when ever directors have breached their duties to the company (being fiduciary duty or otherwise) it is the company which the proper plaintiff unless one of the exceptions to the rule in Foss v. Harbottle is applicable. However, notwithstanding the statement made in (Percival v. Wright) it is clear that the rule stated therein is only general rule and it was held in (Allen v. Hyatt) [222]that it was possible under certain circumstances for the director to owe fiduciary duty directly to shareholders from the date of the decision in (Percival v. Wright) until the decision in (Gething v.Kilner)[223], where in the context of a takeover, Brightman J. held that the directors of the offeree company had a duty to be honest and not mislead[224].

(f) Memorandum and article of association:

S.14 of the (ECA) reads as follow:

"Subject to the provisions of this Act, the memorandum and articles, when registered, bind the company and its members to the same extent as if they respectively had been signed and sealed by each member to observe all the provisions of the memorandum and articles."

Subject to the above section, the constitution of the company has the effect of a contract under seal between the company and each member, between company and each eligible officer and between a member and each other member.

It was held in (Hickman v. Kent or Romney Marsh Sheep Breaders – 1915) [225]that the articles of association only constitute

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[221] - [1902] 2 Ch. 421.
[222] - [1914] 30. T.L.R. 444.
[223] - [1972] 1 W.L.R. 337.
[224] - Peter Willcocks, *supra note 18* at 94.
[225] - [1915] 1 Ch. 881.

a contract to the extent that they affect members in their capacity as members rather in their capacity as outsiders, whether or not the person is subsequently becomes a member.
Also it has been stated:

> *"Not every provision contained in the memorandum and an article of association is capable of being enforced by a member in his own personal capacity. The extensions are the follows:*
> *(1)Where the statutory contract created by the memorandum and articles of association imposes rights and obligations upon a person in a capacity otherwise than that of a member. Accordingly, careful regard must be had to the provisions of the memorandum and articles of association which is sought to enforce against the company as under certain circumstances a member may be precluded from enforcing the statutory contract.*
> *(2) Where the failure to observe the memorandum or articles of association is capable of being ratified by a simple majority of members in general meeting. Whilst it follows from this that it is not every breach of the memorandum and articles of association which gives rise to a personal action on behalf of a member, this rule still leaves the question begged for their appears to be no clear answer as to what types of breaches the memorandum or articles of association are capable of being ratified by a simple majority"*[226].

(iv)Other Member's Statutory Relief:-

Department Of Trade Investigation (in England)

The Department of Trade and Industry is the government Department concerned with the conduct of the companies and the law which governs them. By legislation the Department is given various powers to investigate the affairs of the companies. One way that can be done is by the appointment of an inspector to look into the affairs of the company. The appointment can be instigated in a variety of ways:

(1)On The Application of the Company:

By s.431 of the (ECA) 1985 the Department of Trade may appoint inspectors where company has a share capital, on the

[226] - Peter Willcocks, *supra note 18* at 96.

application of at least 200 members, or members holding at least 10% of the issued shares. Where the company has no share capital, then on the application of at least 20% of members. In any cases, on the application of the company (an ordinary resolution would be sufficient to authorize an application.)[227].

In the past s.431 of the (ECA) has not often been used. This is because it overlaps with s.432, this section is more flexible than s.431 in that anyone can ask the Department to investigate and the Department may exercise their discretion to do if there are circumstances suggesting that the affairs of the company have been conducted with intent to defraud its creditors, or in a manner unfairly prejudicial to some part of members, or for unlawful or fraudulent purpose, or that the promoters or managers have been guilty of fraud or misconduct, or that proper information has not been given to the members.

When appointment of inspector is made under s.432 there is no obligation on the Department to reveal the reasons for the appointment, or who supplied the information leading to the appointment, nor need the Department forewarn the company. In (Norwest Holst v. Secretary Of State For trade- 1978) [228]two inspectors were appointed to under s.432. In the previous two years the company had made record profits, where there was no evidence to doubt it is solvency and the auditor's report had not been qualified. The company sought a declaration that the appointment was invalid since it knew of one of the circumstances specified in s.432. It also sought disclosure of the reasons for the appointment. The action failed because there was nothing in the Act requiring the Department to disclose its reasons, and also the investigation was not necessarily against the company, but against persons who might be acting wrongfully towards the company and its shareholders.

The powers conferred by s.432 are exercisable even if the company is in voluntary liquidation. Also the word "members" includes persons who are members but to whom shares have been transferred or transmitted by operation of law, for example personal representative.[229]

Application for the Department of Trade and Industry investigation is a drastic step which dissatisfied shareholders will usually only be considered after they have failed to obtain a remedy at a general meeting convened by the order of the court

[227] - Geoffrey Morse, *supra note 18* at 333.
[228] - [1978] 3 All E. R. 280.
[229] - See chapter (1) of this research.

through the courts. When an application is received the Department will call for the company to produce documents and records for internal examination by its staff. If the complaint is trivial or insubstantial it will go no further. An inspection will only be ordered if a strong case is made out since an appointment will attract publicity and cause damage to the company. If an inspection is ordered, the inspectors are usually appointed, normally a barrister and an accountant.

(2) Inspection by The Order of the Court.

The Department of Trade must appoint an inspector to investigate the affairs of the company if the court so orders (s.431 "1") of the (ECA) 1985.

When inspectors have been appointed the inspectors must exercise fair and reasonable powers.[230]In (Pergman Press – 1970)[231]the court of appeal held that inspectors were not acting in a judicial or quasi judicial way. Never the less they have a duty to act fairly.

The 1989 (ECA) simplified and extended inspectors powers to obtain and require disclosure of information. The legislative charges are extended to speed up investigations and make the process more effective. The inspector has power to:

(a) Require production of books and documents. Documents are defined to include information recorded in any form (s.56. (ECA) 1989). The documents must relate to a matter which inspectors believe to be relevant to investigation. Previously the document had to relate to the company. The change in the law increases their power to obtain information since it introduce a subjective approach *i.e.* inspectors do not have to demonstrate that information requested actually relates to the company, it is sufficient if they believe to be relevant.

(b) Question on oath any person, and administer the oath accordingly (s.36 of the (ECA) 1989).

(c) Obtain a warrant to enter premises and search for documents (whether or not the documents have been previously requested). To obtain the warrants the inspectors must have reason to believe a serious offence has been committed and that there is a danger that the relevant documents may be moved, tampered with or destroyed unless the element of surprise is available (s. 64 (ECA) 1989)

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[230] - Janet Dine, *supra note 7* at 287.

[231] - [1970] 3 WLR 792.

(d) Investigate the affairs of related companies.
(e) Inform the Secretary of State of any matters coming to his knowledge as a result of the investigation.

The inspector's report (s.437 (ECA) 1985)

The inspector presents his findings in a report to the Department. In some cases the inspector will also make interim reports[232]. The Secretary of State has a discretionary to send a copy of the report to the company's registered office or to provide copies to specified classes of persons, for example members, auditors or persons referred to in the report. The inspector may publish the report, unless inspectors were appointed subject to specific terms that the report would not be published. When inspectors are appointed under a court order, the court must be sent a copy of the report.

By s.55 of the (ECA) inspectors may now be appointed on specific terms that the report the make will not be published *i.e.* the decision to be published is made at outset. This allows a full investigation to be carried out merely to decide whether ground exists for a prosecution or some form of the regulatory action.

By s.57 of the (ECA) 1989 the Secretary of State may curtail an investigation when it becomes clear that a criminal offence may have been committed and the matter has been referred to the appropriate prosecuting authority. In such cases inspectors need not submit a final report to the Secretary of State unless they were appointed by order of the court or unless the Secretary otherwise directs.

Consequences of the report:

By s.60 of the (ECA) 1989 if as the result of the report, it appears to be in the public interest that the company be wound up the Department may present a petition that company be wound up because it is just and equitable to do so, *i.e.* the petition is presented. An inspector's report may be used as evidence to support a shareholder's petition under s. 122 (the just and equitable ground).

By s. 460(1) of the (ECA) 1989 if it appears that there are grounds for petition by a member under s.459 (*i.e.* that the affairs of the company have been conducted in an unfairly prejudicial manner) the Department may, as well or instead of the petitioning

[232] - Geoffrey Morse, *supra note 18* at 336

to wind up the company, present a petition for an order under s.459.

By s.58 of the (ECA) 1989, the Secretary of State may bring civil proceedings on behalf of the company when it appears from any report made or information obtained that it is in the public interest to do so.

The Department may also institute criminal proceedings against persons believed to be guilty of offences.

By s.61 of the (ECA) 1989 an inspector's report is admissible in legal proceedings as evidence of the opinion of the inspectors in relation to any matter contained in the report.

(3) Investigation of the Ownership of the Company.

By s.442 of the (ECA) 1985 (as amended by s.62 of 1989 Act) the Department must investigate the ownership of shares on the application of 200 shareholders or holders of 10% of the issued shares, unless it consider the application is vexation, or unless it considers it is unreasonable to investigate any matter and the Department may investigate ownership if there appears to be good reason to do so[233].

The Secretary of State, before appointing directors, may require the applicants to give up to £ 5000 security to costs.

The inspector has the same general powers as in the investigation of the affairs of the company. The provision relating to the report are also similar, except that by s.44 of the (ECA) 1989 if in the opinion of the Secretary of State , there is good reason for not divulging any part of the report, he may omit that part from the inspector's report.

S.68 of the (ECA) 1989 gives the Secretary of State additional powers of disclosure. He may disclose information relating to share ownership to the following persons:

(a) The company whose ownership was subject to investigation.
(b) Any member of that company.
(c) Any person whose conduct was investigated.
(d) Any person whose financial interests appear to be affected by matters covered by the investigation.

There are powerful actions to support s.442 are provided by s.445 and ss.454-457. In particular the Secretary of State may place restrictions on shares in any case where there is difficulty in finding out relevant facts about the shares, for example no voting

[233] - Id at 337.

rights are exercisable in respect of the shares and any agreement to transfer the shares will be void unless approved by the court or the Secretary of state, acting within defined limits. There also provisions under which the court may order the restricted shares to be sold.

If the Secretary of States believes that there are good reasons to investigate the ownership of the company, but that it is unnecessary to appoint inspectors for the purpose, he may require any person whom he reasonably believes to have information to give such information to him.

(4) Investigation of share dealings.

By s.323 of the (ECA) directors are prohibited from dealing in options to buy or sell the quoted securities of their company or associated companies. By s.324 directors of all companies are require to disclose to their companies their interest in its shares or debentures.

(5) Inspection of documents.

It has been stated that the appointment of an inspector can attract adverse publicity of a company. In 1962 the Jenkins committee[234] recommended that the Department should have further power to require the production of documents and be able to exercise this power with far less publicity. Such inspection of documents may be an end in itself or it may lead to the formal appointment of an inspector. The recommendations were implemented by the Companies Act 1967.

By s.447 of the (ECA) 1985, the Department, if it thinks there is good reason to do so may at any time give directors to any company a direction requiring it to produce any specified books or papers. A similar direction may be made to any person who appears to be in possession of those books or papers. Copies or extracts of them may be taken and any person in possession of them, or a past or present officer or employee of the company, may be required to provide an explanation of them. There are also provision enabling a search warrant to be obtained in respect of premises where the documents are believed to be, provision allowing the Secretary of State to authorize any other competent person (probably a lawyer or an accountant) to exercise his power to require the production of documents. The competent person will then report publication or excessive disclosure (s. 449 of 1985 Act as amended by s.65 1989 act).

[234] - Jenkins Committee report -1962.

(6) Investigation by the Registrar (in Sudan)

In Sudan there many powers conferred on the registrar of the companies

By s. 130 of (SCA) 1925 where the Registrar, in perusal of any document which a company is required to submit to him under the provisions of the Act, is of opinion that any information is necessary in order that such document may afford full particulars of the matter to which it purports to relate, he may, by a written order call on the company submitting the document to furnish in writing such information or explanation within such time as he may specify in his order, and on the receipt of such order, it shall be the duty of any one of the officers of the company to furnish such information or explanation.

By s. 131 of (SCA) 1925 the Registrar may, on the application either of not less than one hundred members or of holding not less than one – tenth of the shares issued, appoint one or more competent inspectors to investigate the affairs of the company and to report thereon in such manner as the registrar may direct. The above application must be supported by such evidence as the registrar may require for purpose of showing that the applicant has good reasons for requiring the investigation.

By s. 133 of (SCA) 1925 the Registrar (in cases other than the application of members) shall appoint one or more competent inspectors to investigate the affairs of the company and to report thereon in such manner as the registrar may direct, if requested by the company by special resolution, or ordered by the court.

By s. 133 of (SCA) 1925 it shall be the duty of all officers and agents of a company whose affairs are investigated by virtue of ss. 131, 132 to preserve and produce to the inspectors all books and documents relating to the company which are in their custody or to a paper before the inspectors when required so to do, and otherwise to give to the inspectors all assistance in connection with the investigation which they reasonably able to give. An inspector may examine on the oath the officers and the agents of the company and may administer on oath accordingly. If any officer or agent of the company refuses to produce to any inspectors any book or documents which is his duty under this section so to procedure, or refuses to appear before the inspector personally when required to do so or refuses to answer any question which is put to him by the inspector with respect to the affairs of the company, he shall be liable to imprisonment.

By s. 134 of (SCA)1925 the inspector may and, if so directed by the registrar, shall furnish interim reports to the registrar and at the conclusion of the investigation, shall make a final report to the registrar.

By s. 135 of (SCA) 1925 If from any report made under s. 134, it appears to the registrar that

(a) Any person has, in relation to the company, been guilty of an offence for which he is criminally liable, the registrar may prosecute such person for the offence;

(b) Proceeding ought in the public interest to be taken by any company referred to in a report , for the recovery of damages in respect of any fraud, misfeasance or other misconduct in connection with the promotion or formation of the company or the management of its affairs or for the recovery of any property of the company which has been misapplied or wrongly retained, he may himself take such proceeding in the name of and on behalf of the company, and the company shall bear any costs or expenses incurred by it in or in connection with such proceeding.

By s.135 B. of (SCA) 1925 In the case of company liable to liquidation by the court, if it appears to the Registrar from the facts of any report referred to in s. 134, that the liquidation of the company is necessary in the public interest, the Registrar, may, unless the company is liquidated by the court, submit a petition requiring the liquidation therefore according to justice and equity.

By s. 136 (SCA) 1925 a copy of the report of any inspectors appointed under (SCA) 1925 authenticated by the seal of the company whose affairs they have investigated, shall be admissible in any legal proceeding as evidence of the opinion of the inspectors in relation to any matter contained in the report.

Conclusion:

Company's decisions are presumed to pass through lawful channels. The first channel is the general meeting which resembles the parliament of the company. The second channel is the board of directors. The board of directors is presumed to represent the majority opinions since those directors are elected by the majority of the shares.

The absolute power of the majority is no longer represent the truth, since that the law in the England and consequently in Sudan recognizes some mechanisms to relief individual or minority shareholder's grievances against the majority.

The statutory relief has been created either to prevent the unfair prejudicial conduct of the company or to wind up the company whenever it is just and equitable to do so. The Common Law relief has been created to relief the individual or minority shareholder either by the derivative action or the personal action. The administrative mechanism has been created to inspect the documents and affairs of the company to protect the individual and minority shareholders.

Chapter 4

Conclusion

All over the world companies have proved to be pioneering in the realm of the grand economical schemes. Companies' role seemed not to be confined to pioneer in projects but also they proved to be effective and influential in planning and commissioning of strategic and infrastructural projects. These facts proved to be rooted to the extent that it is nowadays understood that leading supreme powers in the contemporary world are substantially based on their companies. Moreover, companies have played a very important political and social role through providing jobs, charity funds, scholarships and other contributions.

Sudan is a promising country, rich in different types of resources. On the other hand individual properties seem to be small for building a country like Sudan. Therefore, it seems to be more fruitful to entwine these small fortunes in big influential companies. Spread of company culture and providing legal protection for those who are willing to form companies will encourage them to do so. The contemporary situation of companies in the Sudan does not show that companies have achieved or they are on their way to achieve a significant contribution to the development of the country.

If we are to analyze the factors that prevent companies from playing their different roles, we may attribute them to three main factors:

Firstly, economical factors represented in the weakness of the Sudanese economy in general which casts its shadow on the Sudanese companies.

Secondly, social factors embodied in the weakness of company culture and tendency of individuals to lay their hand on their private properties and run them by themselves. This conception of individualism has been reinforced by the failure of almost all public companies formed during the last few decades.

Thirdly, legal factors embodied in the obsoleteness of the Sudanese Companies Act 1925.

It is clear that Sudan is anticipating a new era of economic growth and prosperity; this is mainly attributable to discovery and production of oil. This economic growth demands a new company law which can digest all expected new variables. Nowadays, a bill to make a new Companies Act was presented to the Council of Ministers to approve it before it is sent to the National Assembly.

Generally, we can conclude our thesis and recommend the followings:

(1) The 1925 Act remained obsolete despite all the amendments underwent in it and all its sections are almost procedural ones, and that does not help in providing legal protection for the investors. We can note that the source of the Sudanese Companies Act (*i.e.* The English Companies Act 1908) has undergone many amendments and developments to cope with the variables of the economy, for example its sections have increased from about 200 in 1908 to 747 in 1985 in addition to 25 schedules whilst the Sudanese Act is almost the same since 1925, except for trivial changes.

(2) Company law is affected by the economy and the development of such Act should cope with the developments of the economical facts on the ground.

If we take banks in the Sudan as an example for the Sudanese companies, we will find that the main problem facing this type of companies lurk on the fact that the fixed assets of these companies have almost absorbed most of their capitals. Such absorbance resulted in a remarkable weakness in running their original activities. Hence, such companies have to create new means and ways to support their liquid capital available for their activities. Preference shares arise as a favorite option for such companies (to support their liquid capitals), but after the (islamization) of the Sudanese laws in 1983 and after passing the Civil Transactions Act 1984, the concept of the preference shares in the English and Sudanese Companies Acts contradicts with principles of Sharia Law (in Sharia, the fixed rate of interests is considered as a sort of usury). This resulted in depriving companies from granting one of the most attractive merits to

preference shareholders and, consequently, preference shares began to decline in Sudan. Therefore, the legislature should reconcile the concepts of Sharia Law and Companies Act as regard the preference shares to encourage issuing of such indispensable shares. It is worth mentioning that experts in Sharia and Economic Laws are available in this country.

(3) The prevailing concept that shareholders rights are mainly three , those are ; the right of a shareholder to attend company meetings and vote, shareholder right to company dividends and the right of a shareholder to return of capital after winding up the company . But after careful tracking in the Sudanese and English Acts, and through the Common Law; we found that the rights of the shareholder are much more than what is known to be. The nature of these rights varies according to the target which a certain right is expected to satisfy.

Some rights are of economical nature like the right of a shareholder to the dividends of the company or the right of a shareholder to return of capital after winding up the company. Other rights are of controllative nature like the right of a shareholder to attend company meetings and vote or the right of a shareholder to have a reasonable opportunity to express views in the company's meetings and the right of a shareholder to propose amendments to the resolutions before passing them. Other rights are of preventive nature like the right of a shareholder not to find his obligations to the company increased without his consent or the right of a shareholder to prevent an irregular forfeiture of his shares or the right of the shareholder to prevent the ultra vires act.

It is beyond the capacity of the Sudanese layman to come to know and understand the essence of such rights since that these rights are widely scattered between the different contexts of the Sudanese and English Companies Acts and through the Common Law.

In our humble view these rights are to be enlisted in a separate section in the Companies Act named (shareholders rights) that which enable lay people to have easy reference for their rights and to exercise them without need for legal aid.

(4) In a country like the Sudan, where the tribal and geographical and even personal considerations, may influence decision making rather the abstract benefit of the company, and certainly in governmental public companies where the overwhelming governmental majority can dissipate the votes of the minority regardless where the benefit of the company lurks,

there is a real need for a new sections in the Act to make a balance between the different considerations.

(5) The legislature must enact provisions for the relief of minority shareholders in the company despite the fact that protested resolutions might have been passed by sufficient majority, for example s. 459 of the English Companies Act 1985 guarantees intervention of the court whenever unfairly prejudicial conduct is suspected to have occurred. This section has conferred the court wide authorities:

(a) To make an order regulating the affairs of the company in the future whenever it is necessary to do so.

(b) To make an order requiring the company to do or to refrain from doing certain acts.

(c) To make an order providing for the purchase of any member's shares by other members or a purchase of such shares by the company itself.

(d) To make an order provide the purchase of the majority shareholder's shares.

By the Common Law the matter may reach the extent of winding up the company if the court thinks that it is just and equitable that the company be wound up.

(6) In Sudan the administrative protection exercised by the companies' registrar is almost confined to levying fees and routine information about the company. This protection should have gone deep to the core of running the company affairs , for example those companies which are compelled by law to hold annual meetings must be answerable to the registrar about whether these meetings have been held or not . Moreover, the registrar is to make sure that the notice of meeting have been properly delivered, and whether the opportunities to express the different views of shareholders have been evenly distributed. The Registrar must monitor the conduct of the chairman who is, in most of the events in the Sudan, a member of the board of directors. So we recommend the support the Registrar office by financial and proper personnel necessary to carry on its responsibilities. Also we recommend the mandating of the Registrar office with quasi judicial powers to penalize companies and to resolve some simple disputes the company.

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